92-1648

FILED
APR 12 1993

No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Appendices A-T

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

ROBERT OZER*
Assistant Attorney General

JOHN B. WORLEY
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2076

*Counsel of Record

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2946

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF THE
STATE OF TEXAS, ET AL.,

Defendants-Third Party
Defendants-Appellants

No. 91-2996

IN RE: GOVERNOR ANN RICHARDS, ET AL.,

Petitioners.

No. 91-6062

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,

Defendants-Third Party Plaintiffs,
Appellees-Cross Appellants,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,

Third Party Defendants,
Appellants-Cross Appellees.

No. 91-6206

LAWRENCE R. ALBERTI, et al.

Plaintiff-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, ET AL.,

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR
OF TEXAS, ET AL.,

Defendants-Third Party

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, HIGGINBOTHAM, and DUHÉ, Circuit Judges.
PER CURIAM:

I

In *Alberti I*, 937 F.2d 984 (5th Cir. 1991), we affirmed virtually all of the rulings by the district court except we remanded for findings required by the Supreme Court's intervening decision in *Wilson v. Seiter*, — U. S. ----, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991). We remanded to allow the district court to find whether the state and county had acted with deliberate indifference. *Alberti I*, 937 F.2d at 1000. We left to the judgment of the district court whether additional hearings or evidence was necessary. *Id.*

The district court did not hold hearings but found on the basis of the record evidence that the state and the county acted with deliberate indifference to the constitutional rights of felons in the Harris County jail.

II

The state's arguments repeat many earlier made. The county presents more difficult questions.

[1] In *Alberti I* we observed that there was "strong if not compelling evidence of deliberate indifference to the plight of these ready-felons." 937 F.2d at 999.[1] Nonetheless, the state

---

[1] The State points out that our prior statements regarding the officials' deliberate indifference are not the law of the case because they were dicta in the earlier decision. Nonetheless, I think it is unlikely that the State can

argues that the finding of deliberate indifference is clearly erroneous. The state suggests that it is not chargeable with knowledge of the jail conditions. The record, however, demonstrates that the state knew that by refusing to accept felons it was causing severe overcrowding in Harris County jails.

[2, 3] The state's second argument denies liability because its officers had a good faith, objectively reasonable belief that the state owed county prisoners no duty. The state relies upon principles of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), and its requirement that the law be "clearly established at the time an action occurred." As plaintiffs point out, this doctrine is applicable only as a defense to the individual liability of persons. *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). The state enjoys no protection from any qualified immunity of a state official.

The closely related argument that given the asserted legal uncertainty of state duty it could not be found to have acted with deliberate indifference has more force. The state points to uncertainty of state responsibility for the care of felons in the county jail in light of rulings by the *Ruiz* court and legislation proposed by the Texas legislature; both signaled that prisoners who are ready for transfer to TDC remain the responsibility of the county until their transfer to TDC. We are not persuaded. The state elected to refuse felons to solve its own problems of overcrowding. We are not persuaded that the state's duty was so uncertain, as we explained in *Alberti I.*

The state also asserts that we should apply the higher standard of "malicious or sadistic intent." In *Seiter*, the Supreme Court held that the level of intent required to constitute cruel and unusual punishment depends upon the constraints facing the official. As examples, the Court contrasted actions responding to a prison disturbance, which must be taken quickly, under

---

change the mind of this exact same panel a little over a year later about the probability that they were deliberately indifferent.

pressure, and with concern for compelling safety concerns with the provision of medical care to prisoners which "does not ordinarily clash with other equally important governmental responsibilities." We read *Seiter* to hold that the constraints imposed on the officer which justify the "malicious and sadistic" standard must at least be of an emergency or immediate nature.

[4] The state argues that it could not relieve overcrowding because the legislature would not appropriate more funds for prison expansion and it was constrained by concern for public safety inherent in early release of felons. Justice Scalia's opinion in *Seiter* leaves open how difficulty in funding might negate the intent requirement. In *Alberti I*, we noted that "before *Seiter*, it was well established to this circuit that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." 937 F.2d at 999, citing *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980). How the Supreme Court will develop the "funding" defense to eighth amendment violations is not certain. Regardless, the evidence that an absence of funding made the state unable to accept the convicted felons is equivocal. Indeed, the state has at earlier times pointed to the *Ruiz* decree's setting of population levels as the culprit. But as we explained in *Alberti I*, that decree was no barrier to the state's constitutional duty. The concern about the release of felons is the flip-side of the inadequate funding argument: if the state would simply expand its prison facilities, no excess release of prisoners would be necessary. We find no error in the finding by the district court that the state was deliberately indifferent and find no occasion for further exploring the "funding" defense.

[5] The district court's conclusion that the county was deliberately indifferent to the unconstitutional conditions in its jail is not so easy. The record is mixed. There is evidence of "arguably formidable constraints" facing the county including the dramatic increase in the number of state ready-felons being kept in the county jail, largely beyond the county's control to prevent.

Nonetheless, the district court found that the jails would exceed "constitutional capacity" with all ready-felons removed.

Whether county efforts to relieve overcrowding were sufficient to avoid a finding of deliberate indifference is a close case. The county can point to several things it did to reduce the jail population. Some of these were successful; some were not through the failure of other participants in the legal system to do their part. For example, the county encouraged local judges to use pretrial release for certain low-risk offenders, but the Special Master found that the judges were reluctant to do so. On the other hand, the county has continued to operate the jail over its constitutional capacity for some time. As we indicated in *Alberti I*, "[w]hile the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding." 937 F.2d at 1000. The district judge was intimately familiar with the push and shove of state government and its response to sorry prison conditions. This trial judge was uniquely informed of the county "mental state" and we decline to upset it. In short, the district court's finding of deliberate indifference is not clearly erroneous.

[6] The county defendants assert problems with the remedies imposed against them by the district court. We declined to address the remedial issues in *Alberti I*. The main argument seems to be that the district court abused its discretion by imposing a cap on the jail population. The county defendants argue that this is the most intrusive remedy and therefore an abuse of discretion. *Ruiz v. Estelle*, 679 F.2d 1115, 1144 (5th Cir. 1982). A numerical cap on the number of prisoners is not an overly intrusive remedy. It gives the county maximum flexibility in determining on its own how to meet the population goals. The remaining contentions are without merit.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2946, 91-2996, 91-6062, 91-6206

Lawrence R. ALBERTI, et al., Plaintiffs,
v.
The SHERIFF OF HARRIS COUNTY,
TEXAS, et al.,

Defendants-Third Party,
Plaintiffs-Appellees,
v.
Ann RICHARDS, the Governor of the
State of Texas, et al., Defendants-Third
Party Defendants-Appellants.

In re Governor Ann RICHARDS,
et al., Petitioners.

Lawrence R. Alberti, et al.
Plaintiffs-Appellees
v.
The SHERIFF OF HARRIS COUNTY
TEXAS, et al.
Defendants-Third Party Plaintiffs,
Appellees-Cross Appellants
v.
Ann RICHARDS, the Governor of Texas,
Third Party Defendants,
Appellants-Cross Appellee.

Lawrence R. ALBERTI

Plaintiff,

v.

The SHERIFF OF HARRIS COUNTY, et al.

Defendants-Third Party
Plaintiffs-Appellees,

v.

Ann RICHARDS, the Governor of Texas, et al.

Defendants-Third Party
Defendants Appellants.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 20, 1992, 5 Cir., ____, ____ F.2d ____)

(January 13, 1993)

Before REAVLEY, HIGGINBOTHAM, and DUHE', Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick S. Higginbotham
United States Circuit Judge

APPENDIX C

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS et al.,
Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS,
the Governor of Texas, et al.,
Third Party Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274 and 91-2801.

United States Court of Appeals,
Fifth Circuit.
July 25, 1991.

Before REAVLEY, HIGGINBOTHAM, and DUHÉ, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is another chapter in the now epic struggle of Texas with its bulging prisons. The reality is that the colloquial expression "state pen" has often been apt. Harris County, Texas, after many years of federal prodding, brought its jails into substantial compliance with constitutional standards. County jails in Texas house both county and state prisoners. A substantial portion of a county's jail population consists of prisoners destined for the state prison system. The struggle of Harris County for an adequate jail system was frustrated by the state's refusal to take its state prisoners. This delay served state penalogical goals, but its resulting success at the state level came out of the hide of Harris County. Judge DeAnda of Houston and Judge Justice of Tyler have commendably presided over this intricate fracas, and we find today no errors in their effort. We are compelled to remand findings of county and state liability due to an intervening decision of the United Sates Supreme Court. We do so despite compelling evidence of state liability, and some

evidence of county liability, only because the requisite fact-findings required by the new law were understandably not made and we decline to exceed our appellate role by supplying the findings.

I.

A. *Procedural background.*

It will soon be twenty years since Lawrence Alberti and his fellow prisoners filed a class action on behalf of past, present, and future inmates of Harris County jails. The complaint named members of the Harris County Commissioners Court and the Harris County Sheriff's Department as defendants and, pursuant to 42 U.S.C. § 1983, alleged that the jails' conditions violated numerous constitutional and statutory provisions.

The original district judge, Judge Bue, conducted extensive hearings, including visits to the facilities. He concluded that conditions in the jails were "inhumane." The plaintiffs and the county then entered into a consent decree on February 4, 1975. The decree called for renovations of existing facilities, the development of a new central jail, and improvements in staff and security. The district court retained jurisdiction to issue further interim orders, and shortly thereafter, on December 16, 1975, the court issued a lengthy opinion setting forth broad guidelines for the streamlining of the criminal justice system, the implementation of an effective pre-trial release program, and the improvement of living conditions within the jails.

At the time of the decree, the county's facilities consisted of a central jail, with a design capacity of 1150, at 301 San Jacinto and a detention center, with a design capacity of 810, in Humble, Texas. In 1982, spurred by the consent decree and later remedial orders, the county completed a new central jail, with a design capacity of 3505, at 1301 Franklin and closed the old central jail. Attendant staffing and supervision concerns were the subject of several additional orders by the *Alberti* court. *See Alberti v. Klevenhagen*, 606 F.Supp. 478 (S.D.Tex. 1985); *Alberti v. Heard*, 600 F.Supp. 443 (S.D.Tex. 1984). The county also commissioned an expert, Dr. Charles Friel, to consider future needs. Pursuant to his projections, the county authorized the construction of a third jail facility, with a capacity of 4000, at 701 North San Jacinto and the renovation of the old central jail, to house 400, at 301 San Jacinto.

The county filed a motion for final judgment and permanent injunction on February 20, 1987. Shortly thereafter, on April 28, 1987, the *Alberti* court appointed three monitors--a special master, a medical monitor-assessor, and a jail monitor-assessor--to periodically inspect the jails and to assess their conditions, to make findings on the county's compliance with its orders, and to determine the maximum capacities of the jails. *See Alberti v. Klevenhagen*, 660 F.Supp. 605 (S.D.Tex. 1987). The monitors issued their first report on October 7, 1987. Of the eighteen conditions surveyed, the monitors found full compliance as to nine, partial compliance as to seven, and non-compliance only as to two, medical and dental care and drug and alcohol treatment. The monitors also found that, as of June 1, 1987, the county's fails were only five percent over their design capacity. However, in light of the inordinate delay in achieving substantial compliance, the monitors recommended continued supervision by the *Alberti* court.

B. *The state's scheduled admissions policy.*

The state of Texas has been beset with its own overcrowding problems. In 1985, after many years of litigation in *Ruiz v. Estelle*, the state entered into a "crowding stipulation," agreeing to limit the population in its prisons to 95% of capacity. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). To stay within the limits, the state periodically closed its prisons to convicted felons sentenced to the state's prison system, and ready for transfer, but awaiting transfer in county jails. In September of 1987, the state attempted to order the rationing with a "scheduled admissions policy," setting daily quotas on the number of ready-felons that it would accept into its prison system from each county.

As stated by the monitors, "[t]he painful consequences for Harris County of this new admissions policy quickly became evident." A backlog of ready-felons developed, and on December 17, 1987, the *Alberti* court directed the monitors to reassess the jails' conditions in light of the state's new policy. The monitors issued their report on March 21, 1988. They found that the jails were "clean, well-run, and reasonably safe and secure," but warned of the potential consequences of the state's scheduled admissions policy:

What this quota policy means for the defendants is obvious. Over the preceding years, the number of convicted felons in

Harris County facilities awaiting transfer to the TDC fluctuated regularly between 100 and 200. By the end of September, 1988 [sic], that number was up to 512; by December 31, 1987, the number stood at 798. Even more alarming than the growth itself is the likelihood that it will continue at about the same rate for the foreseeable future. . . . Harris County is, in effect, operating an 800-bed facility for TDC, by March or April, they may be operating the equivalent of a 1,000 bed facility.

By September of 1988, the monitors' dire forecast was realized. In their fourth report, issued on September 12, 1988, the monitors found that the jails' population increased from 4576 in January of 1988 to 5650 in July of 1988, or thirty percent over design capacity. The monitors concluded that the jails were dangerously overcrowded:

> All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care, and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The monitors further concluded that the appropriate capacities of the central jail at 1301 Franklin and the detention center in Humble were 3330 and 770 respectively, or 95% of design capacity. They recommended that the *Alberti* court direct the county and state to immediately reduce the jails' population to 120% of design capacity (4200 at the central jail and 970 in the detention center) and also set future population caps at 110% of design capacity upon the completion of the renovation of the old central jail at 301 San Jacinto and 95% of design capacity upon the completion of the new facility at 701 San Jacinto.

On November 8, 1988, on the basis of the monitors' report, the *Alberti* court *sua sponte* directed the county sheriff to transport and deliver to the Texas Department of Corrections (later the Texas Department of Criminal Justice--Institutional Division) at least 290 ready-felons each week beginning December 5, 1988. The court reasoned that, under Texas law, "the TDC, not Sheriff Klevenhagen or the Harris County Commissioner's Court, is responsible for housing persons who have been convicted of

felony offenses in the State criminal courts." In support of this conclusion, the court cited Tex. Penal Code §§ 12.32-12.34, Tex.Code Crim.Proc. Art. 42.09 § 2, and Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov.. Code § 499.006). The state, however, refused to accept ready-felons above the quota allocated to the county in its scheduled admissions policy, leaving the county unable to comply with the order.

By December of 1988, the population of ready-felons in the county's jails leaped to over 2100, representing more than a third of the jails' population. On December 12, 1988, the county moved the *Alberti* court to require the plaintiffs to join state officials as additional defendants, urging that it could not achieve constitutional compliance without the participation of the state. The *Alberti* court denied the motion on January 12, 1989, but allowed the county to file a third-party complaint against the state. In the third-party complaint, the county prayed that the court enjoin the state to immediately remove all ready-felons from its jails, the county sought no monetary damages.

The state moved to dismiss the county's third-party complaint and, alternatively, for the joinder of all Texas counties and all ready-felons backlogged in Texas county jails. The state also moved to dismiss for lack of venue, to transfer venue, and to stay the *Alberti* proceedings pending an application to the judicial panel on multidistrict litigation. On May 12, 1989, the *Alberti* court denied the motion, reasoning that the state had a state law duty to "speedily" accept ready-felons and a federal constitutional duty not to impose cruel and unusual punishment on felons. *See* Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov. Code § 499.006). If the state violated the latter constitutional duty, continued the court, then *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), would not bar an order compelling compliance with constitutional standards. The court also denied the venue arguments, concluded that *Ruiz* was no bar to the third-party complaint, refused to abstain, and found the joinder of all other Texas counties unnecessary.

C. *The In re Clements bifurcation.*

On May 30, 1989, the plaintiffs moved the *Alberti* court to transfer to the *Ruiz* court their pending motions for a population cap on the county's jails and the county's motion for an order directing the state to remove ready-felons from its jails. The

state joined the request that the third-party complaint be transferred to the *Ruiz* court.

Meanwhile, on June 26, 1989, the state moved the *Alberti* court to reconsider its May 12 order in light of a recently enacted statute, H.B. 2335, Tex.Gen. & Special Law 1989, Reg.Sess., Ch. 785, effective September 1, 1989. H.B. 2335 made a number of changes in the state's criminal justice system. Most relevant to this appeal, H.B. 2335 created the Texas Board of Criminal Justice as a replacement for the Texas Department of Criminal Justice, deleted the word "speedy" from Tex.Gov.Code § 409.006, and authorized the adoption of the scheduled admissions policy. Alternatively, the state moved the *Alberti* court to transfer the third-party complaint to the *Ruiz* court; the state objected, however, to the transfer of the plaintiffs' pending motions.

The *Alberti* court denied both the requests for transfer and the motion to reconsider on July 10, 1989. The court reasoned that the transfer was not required by this court's *en banc* decision in *Gillespie v. Crawford*, 858 F.2d 1101 (5th Cir. 1988), nor would it advance the purposes of *Gillespie*. As to the adoption of H.B. 2335, the court stated:

[t]he fact that Third-Party Defendants may no longer have a state-law duty to 'speedily' accept convicted felons contrary to their admissions allocation formula does *not* abate their federal Constitutional duties toward these felons. . . . Third-Party Defendants' federal Constitutional duty to not impose cruel and unusual punishment upon convicted felons remains, regardless of the actual location of the felons' confinement.

The plaintiffs and the state then petitioned for a writ of mandamus from this court. We granted the writ in part on August 11, 1989, transferring to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d 145 (5th Cir. 1989).

D. *The bench trial.*

The population of ready-felons in the county's jails continued to escalate, and by March of 1989, the jails' total population exceeded 7200, forcing 2700 prisoners to sleep on the floors each night. As stated by the monitors, "[t]o put this into some perspective, Harris County now has more prisoners sleeping on the floors of its detention facilities than the total number of convicted offenders incarcerated in each of fourteen states." In light of the increase in total population, the monitors revised their recommendations in a report issued on April 11, 1989. They suggested that the *Alberti* court direct the county and state to reduce the jails' population to 7000 (6000 in the central jail and 1000 in the detention center) within 30 days, 6400 (5500 in the central jail and 900 in the detention center) within 90 days, 5800 (4990 in the central jail and 810 in the detention center) within 180 days, and 5200 (4390 in the central jail and 810 in the detention center) within 270 days. They further suggested that the *Alberti* court set a final population cap of 8732, equal to design capacity, upon completion of the new facility at 701 San Jacinto. In a report issued the following month, on June 1, 1989, the monitors concluded that "living conditions for inmates . . . have become intolerable, shocking to the conscience and unequivocally unconstitutional."

The *Alberti* court held a "merits-liability" bench trial August 14 through 18, 1989. By the time of the trial, the total population in the county's jails stood at 8086, or 188% of design capacity, with ready-felons, then a population of 3420, representing 45% of the total population. A parade of witnesses testified to the ill effects of the overcrowding. The lead special master, J. Michael Keating, described "much attenuated protection" because of inadequate staff, inadequate ventilation and food service, supply shortages, precarious fire safety, and a medical care system on the verge of collapse. The captain of the central jail, Don McWilliams, concurred with Keating's assessment and, in addition, testified to "a spectacular increase in the incidence of disciplinary infraction."

The *Alberti* court held an additional hearing on the plaintiffs' requests for supplemental relief September 12 through 15, 1989. At the hearing, the court expressed its concern that the county's joinder of the state as a third-party defendant could suffer jurisdictional defects under *Pennhurst*. Upon the court's

suggestion, the plaintiffs sought leave to file a supplemental complaint against the state on September 15, 1989.

The *Alberti* court issued its findings of fact and conclusions of law on September 25, 1989. The court opened its opinion by granting the plaintiffs' motion for leave to file the supplemental complaint. It found that the conditions in the jails were "cruel and unusual," citing extreme overcrowding as "the primary cause" of the constitutional violation. More specifically, the court found that 2800-2900 prisoners slept on the floor each night, forming a "human carpet" in some cellblocks, that the staff was inadequate to assure the safety of all prisoners, that there had been a great increase in disciplinary violations, that there were problems with plumbing and ventilation, that fire safety was "severely compromised," that supplies and food service were inadequate, that medical care conditions reflected "conscious indifference towards the inmates' serious medical needs," and that county judges gave greater weight to pre-trial release recommendations than state judges.

The *Alberti* court concluded that the county was liable for the violation because, under Texas law, its sheriff and commissioners court were keepers of the jails. Tex.Local Govt. Code §§ 351.001-351.015 and 351.041-351.042. The court further found the state jointly liable because, under Texas law, it had the "primary responsibility" for convicted felons. Tex. Rev. Civ.Stat. Art. 4413(401) § 1.02. In the opinion, the *Alberti* court also transferred the third-party complaint and the supplemental complaint to the *Ruiz* court.

On October 11, 1989, the county moved to supplement or amend the September 25, 1989, findings of fact and conclusions of law and, alternatively, for a new trial. The *Alberti* court denied the motion on October 23, 1989. Shortly thereafter, both the county and the state filed protective notices of appeal. This court dismissed the appeals as premature on January 3, 1990.

E. *Subsequent remedial orders.*

After the transfer to the *Ruiz* court in the September 25 findings of fact and conclusions of law, the *Alberti* and *Ruiz* courts combined to hold joint hearings and issue joint orders on the

remedial aspects of the *Alberti* case.1 The parties at first engaged in settlement negotiations, but when the prospects for settlement dimmed, the combined courts ordered the county and state to submit proposed remedial plans by January 17, 1990. After the parties submitted their proposed plans, the combined courts held joint hearings on February 27 and 28, 1990.

On March 15, 1990, the combined courts entered a joint remedial order, directing the county and state to reduce the jails' population to 6700 upon entry of the order and to 6100 by August 31, 1990. The order contained a number of additional provisions, addressing among other matters a reduction in the population of ready-felons, the development of alternatives to incarceration, and releases of prisoners in the event of non-compliance.

After the parties moved the combined courts to alter or amend the order, the courts vacated the March 15 order and replaced it with a second order, *munc pro tunc*, on April 5, 1990. The April 5 order directed the county and state to reduce the jails' population to 6700 upon entry of the order, to 6400 by May 15, 1990, and to 6100 by August 31, 1990. The order specifically required the state to remove 9130 ready-felons between February 1 and August 31, 1990. The state complied with this aspect of the order. Like the March 15 order, the April 5 order provided for the development of alternatives to incarceration and, in addition, directed releases of prisoners in the event of non-compliance. The combined courts denied the parties' motions to alter or amend the order, or for a new trial on April 25, 1990.

---

1 In an opinion issued shortly after the transfer, Judge Justice described the transfer as partial. Citing *In re Clements*, he stated that:

> it is apparent from the Court of Appeals' opinion that the *Alberti* court retains the power to order certain forms of relief against the State Defendants, so long as that relief does not require those defendants to "receive or take prisoners into TDC" or to take other action "in the operation or management of TDC-operated facilities."

Judge Justice proceeded to direct his special master in *Ruiz* to confer with the *Alberti* special master.

The April 5 order proved effective in reducing the jails' population. By August 13, 1990, the total population stood at 6097, or 130% of design capacity, and the population of ready-felons had dropped to 1069. The renovation of the old central jail at 301 San Jacinto, completed in December of 1989, had increased the combined design capacities of the county's jails to 4698.

Upon the expiration of the April 5 order, the combined courts issued a third joint remedial order on September 7, 1990. In the order, the courts purported "to bridge the next 12 months" until the completion of the new facility at 701 San Jacinto, designed to house an additional 4000 prisoners. The order first required the county to occupy the new facility by September 1, 1991, and provided for "a substantial daily fine for each day beyond September 1, 1991 they failed to occupy the 701 Building." The order further directed the county and state to reduce the jails' population to 6100 upon entry of the order and to 6000 by December 31, 1990, capping the ready-felon population at 1350 and the remaining population at 4751, to be reduced to 4650 by December 31, 1990. Again, like the earlier orders, the September 7 order provided for the development of alternatives to incarceration and directed releases of prisoners in the event of non-compliance.

Pursuant to the September 7 order, the *Alberti* court issued four orders directing the release of 254 pretrial and convicted misdemeanants on September 14, 17, and 18, 1990. Both the county and the state appealed this order. The state obtained a partial stay of the order from this court on September 21, 1990. We later withdrew the stay on the understanding that, first, the combined courts would not release felons without sufficient notice for application by the parties for further stay and, second, that the parties would work together "to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners."

Prior to the releases, the county and state had moved the combined courts to alter or amend the September 7 order, or alternatively, for a new trial. The *Alberti* court set a hearing for October 22, 1990, and ordered the defendants to submit new proposed remedial plans. The court specifically announced that the alternatives to be considered at the hearing would include "(1) temporary housing and the expense and time necessary for the construction thereof and (2) the utilization of facilities of

nearby counties which may have available jail space." After the hearing, the court concluded that the county and state had "not yet developed a feasible strategy for addressing the overcrowding problem in Harris County detention facilities that precludes the need for further releases of inmates, although elements of a possible solution surfaced." The court accordingly directed the defendants to meet with the monitors in the *Alberti* and *Ruiz* cases and "to jointly develop an acceptable plan for dealing with the short-term population crisis in Harris County facilities."

On November 19, 1990, the *Alberti* court stayed the releases authorized in the September 7 order, giving the county and state sixty days to implement alternative programs designed to bring the jails' population within the caps set in the September 7 order. The November 19 order also contained a fallback provision; it stated that if the required caps were not met within sixty days, the court would require "the defendants, or either of them . . . to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners."

On February 7, 1991, upon finding that the jails' population still exceeded the caps set in the September 7 order, the *Alberti* court issued a fourth remedial order. Evidencing a growing impatience, the court refused the state's request to further delay implementation of the population caps established in the earlier orders. Instead, the court implemented an alternative remedy pending the opening of a boot camp in April of 1991 and the new facility at 701 San Jacinto in September of 1991. The order first directs the county and state to reduce the jails' population to 6300 within 45 days. County prisoners, including felons not ready for transfer, are not to exceed 4725 (75% of capacity), and ready-felons are not to exceed 1575 (25% of capacity). If necessary to meet the population caps, the order directs the county sheriff to transfer ready-felons to facilities in other counties. The state is required to deposit $750,000 with the *Alberti* court's registry by March 20, 1991. The order authorizes the county to pay up to $40 per day for the housing of each transferred prisoner, the expenditures are to be reimbursed by the state's deposit to the extent that ready-felons exceed the 1575 cap.

Unlike the previous remedial orders, the February 7 order was not a product of the combined courts. Instead, Judge Justice wrote separately "to clarify my relationship to the relief set

forth." Although he conceded that the order was within the scope of *Alberti*, he suggested that the requirement that the state deposit $750,000 "seemingly falls within the purview of *Ruiz*" and stated that he "would abstain" from deciding whether, under Texas law, the state was obliged to pay costs incurred by the county in housing ready-felons in other counties' facilities.

Both the county and state filed motions to modify the February 7 *Alberti* order. The state also filed a motion to vacate the order and a notice of appeal. While the motions to vacate were pending, the state petitioned for a writ of mandamus from this court, asking that we vacate the portion of the February 7 order requiring the state to deposit $750,000 and, in addition, either enforce or modify our previous decision in *In re Clements*. Alternatively, the state requested a stay of the portion of the order requiring the $750,000 deposit, a writ of prohibition, summary reversal, or certification to the Texas Supreme Court.

On March 15, 1991, the *Alberti* court slightly modified the order and denied the motions to vacate or stay the order. The county and state then filed new notices of appeal. On March 21, 1991, this court similarly denied the state's request for a stay of the portion of the order requiring a $750,000 deposit. The Supreme Court temporarily stayed the provision the same day, but on April 1, 1991, withdrew the stay. The state and county now appeal the September 25 findings of fact and conclusions of law and each of the subsequent remedial order.

II.

The county and the state initially offered little resistance to the assertion that excessive overcrowding in the county's jails renders the conditions of confinement for the plaintiff class unconstitutional. While this appeal was pending, however, the Supreme Court held in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), that the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." In supplemental briefs to this court, each defendant argued that only the other acted with the requisite intent.

Even after *Seiter*, then, the heart of the appeal remains the relative responsibilities of the state and county. The county believes that the state should shoulder full responsibility, as the overcrowded conditions have resulted largely from the huge

backlog of ready-felons. The state, on the other hand, contends that state law places full responsibility for the jails on the county. In formulating its remedial orders, the *Alberti* court faced the difficult task of remedying the constitutional violation without intruding on the state's right, as a sovereign, "to decide who will be held liable for civil rights violations that occur in the course of carrying out [state powers]." *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986). We believe the balance was well struck by the *Alberti* court. However, we vacate and remand the liability findings against the state and the county to allow the *Alberti* court to consider the effect of *Seiter*. Before addressing the liability and remedial issues, we turn to two jurisdictional issues.

A. *Jurisdictional issues*:

1. *The expired remedial orders.*

[1] The first three remedials orders, issued on March 15, April 5, and September 7, are now expired. The county argues that the orders are still appealable, however, because the issues presented by the orders are "capable of repetition, yet evading review." *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). We took this position in an order denying the state's motion to dismiss the county's appeal of the first remedial order as moot but noted that, upon further consideration, the oral argument panel might find the appeal moot. The plaintiffs contend that the first two remedial orders are moot even under *Bell* because the latest order, issued on February 7, 1991, expressly "superseded" them. However, we continue to find the county's characterization convincing. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 123-24 n. 19 (D.C.Cir. 1980).

2. *The medical care findings.*

[2, 3] In its September 25 findings of fact and conclusions of law, the *Alberti* court suggested that the medical conditions in the county's jails constituted an independent constitutional violation.2 However, none of the remedial orders specifically

---

2 The *Alberti* court found that the poor level of medical care reflected "conscious indifference towards the inmates' serious medical needs." Under *Seiter*, 111 S.Ct. at 2321, and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), this finding alone establishes an Eighth Amendment violation.

address medical care. The plaintiffs contend that the county's challenge to the medical care findings is thus premature. We agree with the plaintiffs, but not fully with their characterization of the relevant jurisdictional defect. There has been no final judgment in the *Alberti* case, and the state and county are thus appealing the remedial orders under 28 U.S.C. § 1292(a)(1). As medical care has not yet been implicated in a remedial order, the related findings are outside the § 1292(a)(1) exception to the final judgment rule.

B. *Liability issues*:

1. *The relative obligations of the state and the county.*

[4] The starting point in evaluating the relative obligations of the state and the county is *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). In *Bush*, a class of county inmates brought an action under § 1983 to compel a newly created state commission, the Texas Commission of Jail Standards, to discharge its state law duties. The authorizing statute required TCJS to establish minimum standards for county jails and to review reports of noncompliance. Additionally, the statute gave TCJS discretionary enforcement powers. The plaintiffs urged a "supervisory liability" theory, suggesting that TCJS legally caused constitutional wrongs that it failed to prevent or correct. In rejecting the plaintiffs' theory, we reasoned that Texas law identifies county sheriffs and commissioners courts, not TCJS, as keepers of the county jails. *Id.* at 1206. *Bush* thus concluded as follows:

> [A]ccepting for now the concept that the breach of a state-imposed duty can cause a constitutional tort, we hold that the necessary causal relationship is absent when a state duty to regulate, monitor, inspect, or advise is not accompanied by an obligation to extirpate constitutionally substandard conditions or activities that may be encountered.

Id. at 1208.

Particularly relevant to this appeal is the final section of *Bush*, where we explained "the different roles that state and federal law inevitably play in the analysis of constitutional torts." *Id.* at

1208. Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federally secured right affected? In some cases, particularly procedural due process cases, the federal court must look to state law to answer related threshold questions, such as "whether the claimant in fact had a property right in whatever it was that was taken away from him," but the right itself is defined by federal standards. *Id.* at 1209. Second, was the alleged deprivation of the right accomplished by state action? Here again, some reference to state law is necessary, but "the definition of state action is ultimately a question of federal law." *Id.* Finally, who is the state actor responsible for the violation? Unlike the first two questions, the third question turns *exclusively* on state law. "The states have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." *Id.*

The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails. The county clearly has some responsibility for the conditions in its own jails. Texas law requires the county's commissioners court to provide "safe and suitable jails" and makes the county's sheriff "keeper of the county jail." Tex. Local Govt. Code §§ 351.001 and 351.041. The county does not deny these obligations; rather, it argues that the objectively cruel conditions in its jails have resulted solely from the state's backlogging of ready-felons. For reasons discussed more fully below, *Seiter* gives some new fuel to the county's argument.

By contrast, the state denies any responsibility for the conditions in the county's jails. The *Alberti* court twice rejected the state's contention that Texas law makes the county solely liable, first in an order denying the state's motion to dismiss the county's third-party complaint and again in its September 25 findings of fact and conclusions of law. The court distinguished *Bush* because "[i]n contrast to the Texas Commission of Jail Standards, Third-Party Defendants have a state and constitutionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County Jails." In support of this conclusion, the court cited *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a remarkably similar case.

In *Stewart*, a class of inmates housed in Mississippi county jails brought an action against both county and state officials under § 1983 to challenge the conditions of the jails. The district court granted the state's motion to dismiss on the ground that the state had no authority over the county's jails. On appeal, however, this court held that the district court erred in dismissing the claims against the state. We reasoned as follows:

> Several of the named plaintiffs, and thousands of the putative class members, are state prisoners committed to the custody of the Mississippi Board of Corrections. The district court's holding would allow the defendant state officials to relegate their prisoners to "cruel and unusual punishment" so long as they have no power to change the conditions of confinement in county jails. We reject this theory. This court has consistently held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners in their custody on the ground that it is beyond their power to effect the changes necessary to bring the conditions up to minimal standards. [citations omitted] Even if the district court were correct in deciding that the defendant state officials have no authority to make changes in county jails, the district court could have ordered the state officials to remove prisoners in their custody from any county jail found constitutionally inadequate, or, in the alternative, offered them the opportunity to assist the county in making the necessary changes in order to continue using the jail to incarcerate state prisoners.

Id. at 332.

Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), and *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), like *Stewart*, involved essentially identical situations. In *Benjamin*, after city inmates brought a § 1983 challenge to the conditions of New York City jails, the city moved to join the state of New York as a third-party defendant. The city contended that the overcrowding in its jails resulted from the state's failure to accept convicted felons as required by state statute:

> When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.

N.Y. Criminal Procedure Law § 430.20. The district court granted the city's motion and directed the state to accept felons within 48 hours from the completion of transfer processing.

On appeal, the Second Circuit rejected the state's *Pennhurst* argument and affirmed the order joining the state. Its opinion echoes of *Stewart*:

> [P]risoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, county, or planet, but its own prisoners who have been convicted by New York State courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Id. at 51 (emphasis in original).

In *Tate*, after county inmates brought a § 1983 challenge to the conditions in Jefferson County jails, the county filed a third-party complaint against the state of Kentucky. The state had adopted a "controlled intake policy" pursuant to a consent decree in litigation involving its own prisons, and in accordance with the policy, refused to timely accept felons in the county's jails awaiting transfer to state prisons. After finding that the overcrowded conditions in the county's jails were caused in part by the state's policy, the district court issued an order directing state officials to reduce the number of felons in the county's jails by transferring felons to a state prison within thirty days of sentencing.

On appeal, the state argued that the district court erred in allowing the third-party complaint. The Sixth Circuit affirmed, finding a "substantive basis" for the claim in a state statute:

> When an indeterminate term [1 year or more] of imprisonment is imposed, the court shall commit the defendant to the custody of the bureau of corrections for the term of his sentence and until released in accordance with the law.

Kentucky Revised Statute § 532.100. An accompanying commentary states that § 532.100 "assures that felony offenders, once convicted and sentenced to imprisonment, *shall* be delivered to the Department of Corrections, with the specific place of incarceration to be left to the Department." As the case involved a preliminary injunction, the Sixth Circuit reviewed the district court only for abuse of discretion. But the Sixth Circuit rejected the state's *Pennhurst* argument, affirming the district court's finding that the state was partly responsible for the unconstitutional conditions in the county's jails.

The state's attempt to distinguish *Benjamin* is without merit. The state argues that the result in *Benjamin* turned partly on the fact that New York's refusal to accept convicted felons made it "impossible for the city to comply with the district court's judgment against it in the plaintiffs' favor." The state then cites *Badgley v. Vareles*, 729 F.2d 894, 901 (2d Cir. 1984) for the proposition that, if complete relief can be obtained from the county, then there is no right to an order against the state. The real difference between *Benjamin* and *Badgley*, however, was that in *Badgley* New York was not adjudicated a constitutional violator. *See Benjamin*, 803 F.2d at 52.

The state's reliance on *Bush* is thus misplaced unless the Texas scheme is significantly different from the schemes in Mississippi, New York, and Kentucky. In its September 25 findings of fact and conclusions of law, the *Alberti* court reasoned that the state was jointly liable for the unconstitutional conditions in the county's jails because, although the sheriff is the keeper of the jail, the state is responsible for the confinement of convicted felons under Tex.Pen.Code §§ 12.31-12.34 and Tex. Code Crim. Pro. Art. 42.09. Before the 1989 amendments, continued the court, the transfer of convicted felons was governed by the interplay between Tex. Code Crim. Pro. Art. 42.09 and Tex.Gov. Code § 499.006--§§ 1 and 4 of Art. 42.09 envisioned

"at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less," while § 499.006 provided for a "safe and speedy" transfer to a state facility.3

---

3 The relevant Texas provisions are as follows:

1. *Tex.Pen.Code Ch. 12 (punishments) §§ 12.31-12.34 (ordinary felony punishments):*

(Footnote continued on next page)

(Footnote continued from previous page)

These provisions state that individuals adjudged guilty of a capital felony, first-degree felony, second-degree felony, or third-degree felony "shall be punished by confinement in the Texas Department of Corrections."

2. *Tex.Rev.Civ.Stat. Art. 4413(401) (Department of Criminal Justice) § 1.02 (responsibilities):*

This provision states that the Department of Criminal Justice has "primary responsibility for (1) the confinement, supervision, and rehabilitation of felons."

3. *Tex.Code Crim Pro. Ch 42 (judgment and sentence) Art. 42.09 (commencement of sentence, delivery to place of confinement):*

Section 1 states that, except as otherwise provided, the defendant "shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced." If the defendant is convicted of a felony and sentenced more than ten years, and he gives notice of appeal, § 3 states that he "shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals." If on the other hand, he is convicted of a felony and sentenced less than ten years, and he gives notice of appeal, § 4 states that he shall only be transferred to the Department of Corrections upon his request. *See Ex parte Rodriguez*, 597 S.W.2d 771 (Tex.Cr.App. 1980). None of the provisions specify the proper course *absent* an appeal. Finally, § 8 states that the Department of Corrections "shall not take a defendant into custody" until it receives specified documents from the county.

4. *Tex.Code Crim.Pro. Ch. 104 (certain expenses paid by state and county) Art. 104.002 (expenses for prisoners):*

Although the 1989 amendments deleted the requirement of a "speedy" transfer and authorized the adoption of the scheduled admissions policy, the *Alberti* court concluded that the amendments did not relieve the state of its responsibility for the confinement of convicted felons:

> The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being

---

This provision states that "a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county." It also provides for inter-county (but not state-county) reimbursements.

(Footnote continued on next page)

(Footnote continued from previous page)

5. *Tex.Gov.Code Ch. 494 (Texas Department of Corrections--contracts):*

Adopted as part of the 1989 amendments, this chapter authorizes the Board of Corrections to contract with a private vendor *or* a *county* commissioners court for jail space. *See* Ë 494.001. A private vendor or county under contract with the Board has no authority to compute parole or release dates, award good time, approve furloughs, or reclassify inmates. *See* § 494.004.

6. *Tex.Gov.Code Ch. 499 (miscellaneous matters) Art. 499.006 (transportation of inmates):*

Before its 1989 amendment, this provision stated that the director of the Board of Corrections "shall adopt rules to provide for the safe and speedy transfer of inmates from the counties in which inmates are sentenced to the department." Now, the provision states that the director "shall make suitable provision and regulations for the safe transportation or prisoners from counties where sentenced to the State penitentiary."

7. *Tex.Local Gov.Code Ch. 351 (jails and law enforcement) § 351.041 (sheriff):*

This provision makes the sheriff of each county "the keeper of the county jail."

> confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for those inmates. Fortunately, H.B. 2335 [the 1989 amendatory act] provides a clear answer to this inquiry. Section 1.02(a)(1) provides, "The department [TDCJ, formerly TDC] is the state agency with *primary* responsibility for . . . the confinement, supervision, and rehabilitation of felons." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for the State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. *See Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986).

The *Alberti* court's reasoning is consistent with that of the only state court to have addressed the issue. After the 1989 amendments, Nueces County and Harris County both filed suit in Travis County, contending that the state still had the responsibility either to promptly remove ready-felons or to reimburse the counties for the costs of their housing. In both cases, the state court ruled for the county on the merits; one case is now on appeal, and the other still before the district court on damages issues. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas, pending).4 Since our task, as set forth in *Bush*, is to

---

4 The reasoning of the state court is best laid out in a letter from the judge to the parties dated May 31, 1990. The court reasoned that the statutory provisions placing responsibility for felons with the state were quite clear. Tex.Pen.Code §§ 12.31-12.34; Tex.Crim.Pro.Code Art. 42.09; Tex.Gov.Code § 499.006. On the other hand, the provision cited by the state, the scheduled admissions policy, was ambiguous. "It neither expressly relieves the state of the duty to take and confine felons nor expressly

(Footnote continued on next page)

(Footnote continued from previous page)

places that duty on the counties." The court was also influenced by the awkward effects that in its opinion, the state's interpretation would have:

decide who is liable for the violation under *state* law, we find it appropriate to defer to the state courts on the issue.[5]

---

1. H.B. 2335 which places "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. [citations omitted]
2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.
3. The portions of the court orders which sentence felons to TDC will be meaningless.
4. New duties will be placed on the counties which they have never had before possibly in violation of Article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.
5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state.

The court also noted that a bill relieving the state of financial responsibility for felons left in county jails was introduced, but failed to pass.

As the county points out, the state is a party to both *County of Nueces* and *Harris County*.

5 We find no merit in several related arguments urged by the state. For example, the state argues that, under the supremacy clause, "any such state law duty to accept inmates more speedily (if it ever existed) must give way to orders entered by the federal district court in *Ruiz*." The *Alberti* obligation arises from the Eighth Amendment. The consent decree in *Ruiz* must give way to its demands. At any rate, the *Alberti* court specifically found that the state "could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners."

The state also makes several intent arguments. First, the state points out that "the Very Legislature that passed § 1.02 [stating that the state has "primary responsibility" for felons] failed to enact any appropriations that would enable State Defendants to assume responsibility for the care or treatment of convicted felons in local jails." This argument fails to explain the contemporaneous passage of Tex.Gov.Code § 494.001, authorizing the state to contract for jail space with private vendors or counties. Second, the state contends that the Legislature rejected three bills to compensate states for holding ready-felons. But, as the county points out, these "proposed" bills never even reached the floor for a vote.

2. *The deliberate indifference requirement.*

[5] Our conclusion that state law imposes responsibilities on both the state and the county does not end our inquiry. At the time of the liability hearings before the *Alberti* court, the focus of the parties and the court was on the objective conditions of confinement in the county's jails. *See Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). This circuit had earlier held that "unlike 'conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)), vacated on other grounds, 858 F.2d 1101 (5th Cir. 1988). Both the county and the state expressly conceded that excessive overcrowding rendered the conditions of confinement in the county's jails unconstitutional, and each attempted to persuade the court that the other should shoulder full responsibility.

While this appeal was pending, however, the Supreme Court held that prison conditions rise to the level of cruel and unusual punishment only when they are a product of state indifference. In *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2325, 115 L.Ed.2d 271 (1991), the Court identified the source of this subjective requirement as "the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." In prison conditions cases, like *Alberti*, the requisite intent is "deliberate indifference" as articulated by the Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). *Id.* ___ U.S. at ___, 111 S.Ct. at 2326.[6]

---

6 In *Seiter*, the Supreme Court stated that, in emergency situations, the requisite intent rises to "acting `maliciously and sadistically for the purpose of causing harm.'" *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2321. The state argues that we should apply this higher standard because of a purported clash between the state's responsibility to ready-felons in the county's jails and its responsibilities under the *Ruiz* decree. We think it clear, however, that the Court was concerned with short-term emergencies

The deliberate indifference requirement of *Seiter* and *Estelle* is not wholly separate from the objective requirement of *Rhodes*. In *Seiter*, the Court explained that the "long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id.* at ___, 111 S.Ct. at 2325. Several lower courts, cited in *Seiter*, have found deliberate indifference where prison officials were aware of objectively cruel conditions but failed to remedy them. *See Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987). In *Alberti*, there is little doubt that both the county and the state knew that the conditions of confinement in the county's jails deprived the inmates of basic needs. The county's jails had been under the continuing jurisdiction of the *Alberti* court since 1975, the monitors' reports became increasingly strident after mid-1988, and both the county and the state expressly admitted that he conditions of confinement were objectively unconstitutional during the liability hearings.

In deciding whether the county and the state were deliberately indifferent to the needs of the plaintiffs, however, we must also consider any relevant constraints. As Justice Scalia explained, "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the official." *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), written by former Justice Powell and cited extensively in *Seiter*, is instructive. In *LaFaut*, a paraplegic prisoner alleged that prison officials had denied him adequate toilet facilities and necessary physical therapy in violation of the Eighth Amendment. In reviewing the district court's findings, Justice Powell noted that, although LaFaut specifically informed prison officials that his toilet facilities were inadequate, they made no attempt to modify the facilities for two months and, when their initial attempt failed, waited another month before transferring LaFaut to a cell with adequate facilities. Similarly, although LaFaut repeatedly requested physical therapy and official medical reports confirmed the need for therapy, he waited two months for minimal motion therapy and eight months for a transfer to an institution with adequate therapy.

---

where prison officials must act "in haste, [and] under pressure." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084, 89 L.E.d2d 251 (1986).

Justice Powell concluded that, because there was no reason for the delays, the prison officials had been deliberately indifferent to LaFaut's needs:

> There is nothing in the record before us . . . to justify the inordinate delays in accommodating appellant's needs in light of the practicality and availability of various solutions. Prison officials should not ignore the basic needs of handicapped individuals or postpone addressing those needs out of mere convenience or apathy. As appellee Hambrick was the responsible official in charge of Butner, and she was fully advised both of the inhumane conditions of appellant's confinement and the failure to provide him with needed therapy we concluded that her neglect constituted "deliberate indifference" and therefore violated the Eighth Amendment.

Id. at 394.

The state contends that its actions were not deliberately indifferent but instead necessitated by the *Ruiz* decree and the over-crowding problems in its own prisons. However, the *Alberti* court specifically found that:

> State Defendants could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives [such as contracts with other suitable facilities or early releases as authorized by the Texas Prison Management Act, Tex.Rev.Stat.Ann. Art. 6184*o*] in its May 12, 1989 Memorandum and Order.

There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state chose to leave them in the jails. This is strong if not compelling evidence of deliberate indifference to the plight of these ready-felons, and it is only accented by the alternatives available to the state. As found by

the *Alberti* monitors, the state's management of ready-felons in Harris County "in essence . . . ignore[d] those state prisoners. . . . " Significantly, the state could have housed prisoners in a variety of ways. Even housing them under conditions of a military bootcamp would not touch the Eighth Amendment. Indeed, a tent city would be far superior to the conditions in the county's jails. The state cannot turn away from the use of such common sense solutions by pointing to the *Ruiz* decree. The district court explicitly found that the decree was no impediment; and in any event, the *Ruiz* decree could not legally impede such plain responses, at least to the extent its constraints were not themselves required by the Constitution.

Nor does this record offer substantial evidence that the state's actions were constrained by legislative refusal to fund the only means by which the state could have relieved the county. Before *Seiter*, it was well established in this circuit that "inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980); *see also Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). Other circuits have found deliberate indifference over allegations of inadequate funding. *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 (11th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983). The issue is assured currency by the intent requirement of *Seiter* and that opinion's leave of it. *See Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. We need not address the issue here in the absence of findings pointing the finger at the legislature. In short, however, this record leaves us skeptical of the assertion that a recalcitrant legislature was the culprit.

We would, by necessity, affirm a finding that the state was deliberately indifferent. Indeed, such a finding on this record would be virtually unassailable. There is understandably no such finding, however, because deliberate indifference was not an issue when the *Alberti* court ruled. As strong as the case is, we are reluctant to conclude that a finding of deliberate indifference is compelled as a matter of law. Factfinding is a province of the district court. We therefore remand for the appropriate findings and leave to the district court the decision to take any further evidence.

[6] The county also argues that its actions were not deliberately indifferent after *Seiter*. Again, there is no finding,

but here the record offers some evidence of arguably formidable constraints. The *Alberti* court noted in its September 25 findings of fact and conclusions of law that, until the state began refusing ready-felons, "it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually led to full compliance with all Court orders with a minimum of direct judicial intervention." In June of 1987, the county's jails were only five percent over capacity, and the number of ready-felons in the county's jails had regularly fluctuated between 100 and 200 for several years. Upon the state's decision to backlog ready-felons, their numbers quickly jumped to 512 in September of 1987, 798 in December of 1987, 2100 in December of 1988, and 3420, or 45% of the total population of 8086, by the time of the liability hearing in August of 1989.

In light of the increase in the population of ready-felons over such a short period of time, we cannot conclude from the record as it now stands that the county has deliberately ignored the needs of its inmates or that its delay in accommodating the overcrowding has been "inordinate." *LaFaut*, 834 F.2d at 394. By contrast, any increase in the population of state prisoners, including ready-felons, was expressly contemplated by the state. The 95% "crowding stipulation" in *Ruiz*, signed by the state, provides that:

> The parties further acknowledge that certain conditions and eventualities are within the contemplation of the parties. These include the possibility that TDC may experience a substantial increase or decrease in its population.
> . . .

See Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987).

While the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding. For example, the *Alberti* court found problems with the jails' plumbing, ventilation, fire safety, supplies, food service, and medical care. The *Alberti* court also found that the constitutional capacity of the county's jails equalled their designed capacity and that "[e]ven if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates." The 1975 consent decree could also factor into the county's liability. We thus remand for the appropriate finding

and, again, leave to the *Alberti* court whether it will conduct further hearings or consider additional evidence.

[7] Although we do not decide the liability question, one remaining issue is relevant to the remand. The county argues that the *Alberti* court erred in equating the constitutional capacity of its jails with their design capacity. But, in its September 25 findings of facts and conclusions of law, the court expressly recognized its obligation to consider the "totality of the conditions." And its findings contemplate a number of factors in addition to design capacity--the fact that thousands of inmates were sleeping on the floors, the physical design of the cellblocks, the inability of the staff to control the inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous.

C. *Remedial issues:*

[8] The state's attacks on the remedial orders are all jurisdictional. First, the state argues that the orders violate the Eleventh Amendment because they enforce state law against the state, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 97 L.Ed.2d 67 (1984), *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Kelley v. Bd. of Educ. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987). The state contends that the county is fully responsible for the conditions in its jails and that any duty the state might have to promptly remove ready-felons arises only under state law. While we agree with the state's premise, we reject its assumption that its duties arise only under state law. As discussed above, in *Stewart*, 669 F.2d at 333, a case involving a challenge to overcrowded conditions in Mississippi county jails, this court found the state partially responsible for the unconstitutional conditions because "state officials cannot shed their constitutional obligations by putting state prisoners in county jails." *Accord Benjamin*, 803 F.2d at 46; *Tate*, 735 F.2d at 986. Although *Stewart* predated *Pennhurst*, both *Benjamin* and *Tate* rejected *Pennhurst* arguments in identical situations. As reasoned by the Second Circuit:

> This argument [*Pennhurst*] must be rejected, however, for the reason that the prisoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, country, or planet, but its own prisoners who have been convicted by New York state courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Benjamin, 803 F.2d at 51 (emphasis in original). In sum, because the state is responsible for ready-felons, *Pennhurst*, *Bush*, and *Kelley*, are distinguishable.[7]

[9] The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders--the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus "a necessary consequence of compliance in the future with a substantive federal question determination." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *Kelley*, cited extensively by the state, is distinguishable--the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order. *See Kelley*, 836 F.2d at 990-94.[8]

---

7 In *Kelley*, cited extensively by the state, Tennessee was not a present constitutional violator when the order against it was entered. *See Kelley*, 836 F.2d at 989-90, 993-94.

8 The state also makes a general federalism argument, suggesting that "[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute." Again, this argument mischaracterizes the action; the state is responsible for a

[10] Finally, the state argues that the *Alberti* court should have abstained from ordering it to pay for the housing of ready-felons in other county's jails pending the ultimate resolution of the state litigation, discussed above. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, pending). But none of the abstention theories cited quite fit the facts of *Alberti*. The *Alberti* court has already decided the federal issue; the state issue implicates only the remedy. Moreover, in resolving the state issue, the *Alberti* court simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court. *See County of Nueces*, No. 452,071 (holding that the state must compensate the county $40 per day for each ready-felon left in the county's jails more than seven days after sentencing).

In sum, the state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities." The issue, then, is whether the state or the county should pay for the housing of ready-felons in other county jails pending the resolution of the state litigation. If the state is found liable on remand, plaintiffs are entitled to their long-awaited remedy. The state's arguments seem to assume that the county should pay all housing costs until the state courts decide otherwise. But the presumption is baseless. Assuming the findings of state liability, the *Alberti* court chose the best available course in modeling relief on *County of Nueces*.

Because the liability findings against the county are far more problematic, we do not address the remedial issues raised by the county.

D. *Procedural issues:*

---

federal constitutional violation. Unless the plaintiff were to be left with no remedy, the *Alberti* court had to apportion liability between the state and county. The relevant federal question, then, is the Eighth Amendment issue; the dispute between the state and the county implicates only the remedy.

1. *The jurisdiction of the Alberti court to unilaterally impose the February 7 order.*

[11] The state does not argue, as it did in an earlier request for mandamus, that the February 7 order violates our opinion in *In re Clements*, 881 F.2d 145 (5th Cir. 1989). Instead, the state contends that the *Alberti* court was without jurisdiction to unilaterally impose the order because, in its September 25 findings of fact and conclusions of law, the *Alberti* court transferred both the county's third-party complaint and the plaintiff's complaint against the state to the *Ruiz* court. In *In re Clements*, we transferred to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d at 154. The September 25 transfer by the *Alberti* court was arguably broader than required by *In re Clements*; upon finding the state liable, the *Alberti* court

> ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit of Appeals entered in this case.

The *Alberti* court retreated in its February 7 order, however, where it stated:

> None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the *Ruiz* case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the *Ruiz* orders and agreements.

As evidenced by his separate February 7 *Ruiz* opinion, Judge Justice disagreed.

The cases cited by the state involve inter-district transfers. The plaintiffs contend that an intra-district transfer, by contrast, does not divest the transferor of jurisdiction. They point to the fact that both the *Alberti* and the *Ruiz* courts are a party of the Southern District of Texas and conclude that Judge DeAnda had the jurisdiction to impose the remedy regardless of the transfer. "Jurisdiction is lodged in a court, not in a person." *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965).

We need not address the distinction urged by the plaintiffs because we read the transfer order by the *Alberti* court to transfer only limited jurisdiction to the *Ruiz* court; the later joint hearings and joint orders reflect an intent to *share* jurisdiction over the third-party complaint and supplement complaint rather than to transfer jurisdiction entirely. In *In re Clements*, we suggested that "minor or indirect" effects on the state's prison system were within the sphere of *Alberti*, and in addition, saved to *Alberti* "plaintiffs' several motions in that case for orders establishing a limit or 'cap' on the number of inmates confined in the Harris County jail facilities (either as a whole or as to individual units)." *In re Clements*, 881 F.2d at 153. These reservations suggest that the February 7 order fell within the realm reserved to the *Alberti* court. Reading *In re Clements* to preclude an *Alberti* order with *any* effect on the state would leave the *Alberti* court powerless to remedy the overcrowding in the county's jails, since ready-felons account for such a large percentage of the jails' population.

2. *Procedural due process.*

The state also makes a general due process argument, suggesting that the *Alberti* court erred in issuing the February 7 order without a hearing. Given the large number of hearings held in *Alberti*, it is difficult to take this argument seriously. At any rate, it is clear from the record that the order was the direct product of a hearing held on October 22, 1990. The ordering schedule for the October 22 hearing specifically announced that one of its purposes was to consider "the utilization of facilities in nearby counties which may have available jail space."

3. *The order of relief against the Texas Board of Pardons and Paroles.*

The state next argues that the *Alberti* court erred in ordering relief against the Texas Board of Pardons and Paroles because the Board was not named a party to the action. The state emphasizes that, under Texas law, the Board is an independent agency. *See* Tex.Const. Art. IV § 11; Tex.Code Crim.Pro. Art. 42.18 § 1. In 1989, however, the Texas Legislature abolished the Board and transferred its duties to the Department of Criminal Justice, successor to the Department of Corrections. *See* Tex.Gen. & Special Laws 1989, Reg. Sess., Ch. 785 § 1.20. Because the Board of Pardons and Paroles is now part of the Department of Criminal Justice, we find no error.

4. *The supplemental complaint.*

Finally, the state argues that the *Alberti* court erred in allowing the plaintiffs to file a supplemental complaint against the state after the liability trials. As the county and plaintiffs point out, however, the state was a party to the action, a third-party defendant, during the trial. The state contends that its trial strategy would have been different had it been an actual defendant, but it does not explain why. Because the state has not sufficiently demonstrated prejudice, we find no error.

5. *Pending motions.*

On April 23, 1991, the *Alberti* court entered an order continuing its February 27 order in effect through September 15, 1991. The state moved to vacate the order, and the *Alberti* court denied the motion on May 1, 1991. On May 9, 1991, the state noticed its appeal of the April 23 order and moved this court to consolidate its appeals. The plaintiffs joined the motion to consolidate the appeals, but the county moved the *Alberti* court to vacate the April 23 order on May 10, 1991, and argued that its motion to vacate rendered the state's appeal of the April 23 order premature. On May 20, 1991, the county conceded that its motion to vacate was untimely under Fed.R.Civ.P. 59(b), noticed its own appeal of the April 23 order, and requested that this court consolidate the appeals. Both the state and the county filed additional notices of appeal after the *Alberti* court denied the county's motion to vacate on June 4, 1991.

On May 28, 1991, the *Alberti* court entered an order requiring the sate to deposit an additional $1,000.000 with its registry by

June 10, 1991. The state moved to vacate the order on June 3, 1991, demanding an answer by June 4, 1991. On June 5, 1991, when the *Alberti* court failed to "promptly" respond to the motion to vacate, the state moved this court to stay the order, arguing that the *Alberti* court had "effectively" denied its motion to vacate. The state also noticed its appeal of the May 28 order and moved this court to consolidate its appeals. The county opposed the stay, arguing that the state's motion presented the very same issues rejected by this court when we denied the state's motion to stay the February 7 order.

We grant both motions to consolidate the appeals and adopt the briefs already filed. Finally, we grant the motion of the state to consolidate its latest appeal filed on July 10, 1991, and its most recent petition for writ of prohibition docketed under cause number 91-2801 with the above referenced appeals, and to adopt the briefs on file.

In sum, we remand the case for the limited purpose of allowing the district court to enter findings regarding the issue of deliberate indifference, now required by *Seiter*. We leave to the discretion of the district court whether to take additional evidence or conduct any further proceedings in that court regarding this issue. We stay the orders of the district court which are the subject of this appeal, pending the district court's findings regarding deliberate indifference. The stay will abide the district court's findings on the issue, vacating automatically, and without the need of a further order of this court should the district court find that the state was deliberately indifferent.

REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS, et al., Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS, the Governor
of Texas, et al., Third Party
Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274
91-2801, 91-2946 & 91-6101.

Appeals From the United States District Court for the Southern
District of Texas

ORDER DENYING PETITION FOR WRIT OF
PROHIBITION AND STAY
AND PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM and DUHÉ, Circuit Judges.

BY THE COURT:

The State of Texas has petitioned for panel rehearing and has also requested that we order the district court not to

disburse $2,000,000 deposited by the state in the registry of the court.

The state argues that the legislature, by enacting H.B. 93, and the parties by their settlement agreement, have changed the legal relationship between the state and counties in ways that require reconsideration of our earlier opinion and warrant a stay of any disbursal below. We are unpersuaded and deny both the application for stay or writ of prohibition and petition for rehearing.

First, we are not persuaded that the Texas Legislature attempted to speak to the historical relationship between the state and its counties in the handling of prisoners. The state argues that H.B. 93 made clear that the duty owed to the counties that we found was, in fact, never owed. The state points to the statutory language that: "The legislature declares that until September 1, 1995 the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under § 499.071." H.B. 93, § 11.02 (emphasis supplied). The argument continues that this language "makes clear" that Texas counties have always had the duty to house prisoners contracted for by the state in this suit; that H.B. 93 is a legislative ratification of the Texas Department of Criminal Justice's interpretation of its and the county's liability.

H.B. 93 also provided, however, that the counties were to continue to perform their duty to confine and maintain inmates at the county's own expense until the date the inmate is accepted into the institutional division, unless the state suits were settled by written agreement. So, the word continue could describe a time from August 29 forward, or it could describe a legislative view of both current and past legal relationships.

The state also points to certain legislative history; that the legislation which failed in the first called session provided for the payment of costs of transferring inmates to other facilities

from February 7, 1991. That legislation failed when the Senate refused to concur. Relatedly, the state points out that there ware no appropriations for paying the costs of transfers made before those ordered by the Jails Standards Commission after October 1, 1991. The sum of these events, the state argues, is that the legislature did not intend that the state would pay for "earlier debt." And, of course, the state says we should not meddle, because to do so would step hard on principles of federalism. We find this argument unpersuasive.

The federal court orders addressing the liability of the state for certain county prisoners were a lion in the street when the Texas Legislature addressed the problem in August 1991. An effort by the state to undo those orders by a declaration of state law or otherwise would have presented its own set of problems. Under these circumstances, we are persuaded that if the Texas Legislature had intended the actions now claimed for it by the state's lawyers, it would have said so in clear language. We are not persuaded that the legislature would have left such a large undertaking to inference and innuendo. The same is true for the later "settlement", conspicuous for its silence over the obligations of the state for costs incurred before August 29, 1991.

The petition for writ of prohibition, stay and panel rehearing are DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	C.A. NO H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

Pending are Plaintiffs' Motion for Emergency Supplemental Relief and State Defendants' Motion to Modify Final Order or to Stay Imposition of Fines. The Court has reviewed the pleadings and responses filed and has heard oral argument presented by counsel for all parties. State Defendants argue that they have made a good-faith effort to meet the March 31 deadline established in the September 29, 1992 Final Order, and the Court recognizes and applauds the activity undertaken by them in the last six months. State Defendants concede, however, that they have no plan which would alleviate the overcrowding in Harris County jail facilities before the end of 1993 and no recommendations regarding the overcrowding problem between now and that time.

The current conditions at the Harris County jail are barbaric and cannot be tolerated another eight or nine months. Inmates are sleeping on floors with backed-up sewage, are riding in dangerous elevators, and are being exposed to tuberculosis

and other diseases. Upon release, former inmates are exposing the general public in Harris and surrounding counties to highly-communicable diseases. As stated by the Monitors in their most recent findings of fact, "any extension of these conditions in the name of economy entails grave risks to the health and security of inmates and staff in the Jail, and to the broader community beyond the Jail."

The statistics, both total population and ratio of TDCJ-ready felons to total population, are staggering and continue to rise at an alarming rate. It is estimated that by 1998, the statewide backlog of TDCJ-ready felons housed in county facilities will exceed 35,000 inmates. Eighty percent of these will likely be housed in Harris County. The Harris County Jail Facility will eventually house more TDCJ inmates than almost any TDCJ facility. These TDCJ-ready felons are State inmates, and the citizens of Harris County should not be required to bear the health and financial burden of the State's responsibility to house its convicted felons.

Because of the egregious conditions caused by drastic overcrowding, caused in turn by the State's inability to accept its own prisoners, as well as the alarming rate of population growth at the Harris County facilities, the Court cannot and will not modify or stay the March 31, 1993 deadline.

For purposes of clarification, however, the Court notes that the provision in the September 29 order relating to a "fine" is more properly described as a sanction to be paid into the Court's Registry for appropriate use pursuant to orders of this Court to alleviate, as much as possible given the extreme overcrowding, the conditions at the Harris County facilities.

Based upon the foregoing and for the reasons stated orally by the Court at the conclusion of today's hearing, it is

ORDERED that Plaintiffs' Motion for Emergency Supplemental Relief is **DENIED**, and

ORDERED that State Defendants' Motion to Modify Final Order or, In the Alternative, to Stay Imposition of Fines is **DENIED**, except that the September 29 Final Order is clarified to reflect that the "fine" is more appropriately deemed a monetary sanction to be deposited into the Court's Registry for use in attempting to alleviate overcrowding and the resulting conditions at the Harris County Jail Facilities.

SIGNED this 23rd day of March, 1993, at Houston, Texas.

/s/
NORMAN BLACK
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiff,	§	
VS.	§	C.A. NO. 72-H-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

IT IS HEREBY ORDERED that County Defendants' Fifth Motion to Require State Defendants to Deposit Funds is **GRANTED**, and it is further

ORDERED that State Defendants shall deposit into the Court's Registry, Account #72-1074-2, on or before December 4, 1992 the sum of $5,899,874.25, and it is further

ORDERED that within ten (10) calendar days of the deposit by State Defendants as directed herein, the Clerk shall issue a check drawn on the Court's Registry to Harris County, Texas, in the amount of $5,899,874.25 together with any and all interest accrued thereon and shall send said check to:

Harris County, Texas
c/o Harris County Attorney's Office
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164

SIGNED this 23rd day of November, 1992, at Houston, Texas.

/s/
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	C.A. NO H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

FINAL ORDER

In accordance with the memorandum opinion signed this day, it is hereby

ORDERED

as follows:

(1) The County Defendants shall implement the Proposed Joint Plan. The full expense of all programs therein except those discussed in the memorandum opinion as falling within the traditional role of County detention facilities shall be paid by the State Defendants. The expense for these traditional County programs shall be paid by the County Defendants.

(2) The Monitors' Tentative Findings of Fact filed in June 1992 are adopted in their entirety as the findings of the Court.

(3) The County Defendants shall, at their own expense:

(a) Submit within 90 days of entry of this order for the review and approval of the Court a plan that will either bring the County Defendants into full compliance with the 9-9-7 provision of the Consent Decree or provide, through some alternative plan, sufficient staff to meet the security, classification, transportation, and other needs of all of the County's detention facilities, such plan to include funding arrangements and a schedule for implementation; and

(b) Submit within 30 days of entry of this order for the review and approval of the Court a comprehensive written medical plan; and

(c) Submit within 30 days of entry of this order for the review and approval of the Court a written plan for the immediate repair of the Central Jail ventilation system ("HVAC system"), together with definite arrangements for funding those repairs and an expedited renovation schedule; and

(d) Submit within 30 days of entry of this order evidence that the County Defendants have an adequate number of mattresses such that each inmate is provided with a mattress; thereafter, a fine of $50 per day per inmate shall be paid to the Court by the County Defendants for each inmate having to sleep on the floor without a mattress; and

(e) Submit within 90 days of entry of this order evidence that the kitchen equipment deficiencies described in the findings of fact have been remedied.

(4) The consent decree is modified to provide for a constitutional capacity for the Harris County Jail facility of 9800 inmates, 112.5% of design capacity. Specific population caps for each unit are as follows: 701 Building - 4500 inmates; 1301 Building - 3950 inmates; 301 Building - 475 inmates; and

Detention Center - 875 inmates. The population of the Harris County Jail facility shall be reduced to this new cap by no later than March 31, 1993. The State Defendants shall pay to the Court a fine of $50.00 per inmate over the cap per day after March 31, 1993 that the population in the Harris County facility exceeds 9800 inmates.

(5) Except as set forth in this order, the consent decree and all subsequent remedial orders are vacated.

(6) The Monitors' Fees incurred from February 1, 1989 shall be taxed ninety percent (90%) to the State Defendants and ten percent (10%) to the County Defendants. County Defendants shall submit within 14 days an affidavit memorializing those fees.

(7) The Court shall retain jurisdiction to resolve requests for attorneys fees and to ensure compliance with this final order.

THIS IS A FINAL ORDER.

SIGNED this 29th day of September, 1992.

/s/
JAMES DEANDA
Chief Judge
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	C.A. NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY,	§	
et al.,	§	
Defendants.	§	
v.	§	
	§	
ANN RICHARDS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION

Pursuant to Court Order the Defendants have filed a Proposed Joint Remedial Plan to correct constitutional deficiencies in the county jail facilities. Thereafter, the Special Master submitted his most recent periodic report, including findings, to which the Defendants have responded. The County Defendants have petitioned that the Monitor's fees and expenses be taxed against the State Defendants and the Court will now address these matters.

PRESENT INMATE POPULATION

The population of the Harris County Jail Facility continues to grow at an alarming rate. There are currently 14,500 Harris County and TDCJ-ready inmates in the Harris County facilities including those housed in outlying counties. As

of September 21, 1992, the population of the main jail was 6,455 compared to a design capacity of 3,505. There were some 1800 female inmates in Harris County. Perhaps the most significant statistic, however, is that 53% of the Harris County Jail Facility population is TDCJ-ready. The Court finds that the refusal of the State to accept its inmates is the principal cause of the current population crisis.

DEFENDANTS' PROPOSED JOINT REMEDIAL PLAN

As the Court directed, the State and County Defendants submitted a Proposed Joint Plan addressing the problem of overcrowding at the Harris County Jail Facility. In the past, Defendants' focus on assessing or avoiding blame rather than on resolving immediate and long-term problems has been counter-productive. Defendants note that this Plan, however, is the result of "a surprising and encouraging spirit of cooperation." The Court agrees. The current jail dilemma is the product of gross neglect and deliberate indifference to both then existing and readily predictable prison conditions of the predecessors of present state officials.

Several positive steps are contemplated by the state to alleviate unconstitutional conditions including:

(1) Acceleration of the review of alleged parole violations to reduce the time parolees spend in county jails awaiting determination; and

(2) Including in the allocation of prison space to the various counties, consideration of an inmate's risk to society. By this means a county having prisoners convicted of violent crimes might be allocated prison space originally designated for a county holding nonviolent offenders.

The Court recommends that the state consider developing a system of releasing parolees that would be equitable to the law abiding citizenry and more effective and

compatible with the goal of the parole system--rehabilitation with appropriate assistance and monitoring. Saturating densely populated metropolitan areas with the vast bulk of parolees is not the answer. Undeniably high recidivism rates among parolees under parole policies now in vogue have substantial impact on jail populations. A more even distribution of the risk of parole release under these circumstances will result in an increased statewide awareness and appreciation of the problems visited upon large metropolitan counties with a concomitant effect on the State Legislature.

STATE SENTENCES

The State Defendants and the Special Master have previously identified a preference of Harris County Judges for sentencing convicted felons to incarceration in the prison system. Understanding that rampant criminal activity is both a serious problem and a major political issue, the reality in Texas is that the prison system is nothing more than a revolving door. Each convicted felon sentenced to incarceration by the District Judges of Harris County results invariably in the expedited release of another convicted felon within the system. It is important to understand there is little control over which inmates must be released to make room for the new arrival. The released inmate may be someone who potentially posed a much greater risk to society than the newly sentenced inmate. However, the sentences imposed by the State District Judges in Harris County are within the legal limits established by the State Legislature. Consequently, having created the sanctions available to and utilized by State District Judges, the State must also provide the resources to carry out those sanctions.

Another immediate threat to society is posed by the potential release of inmates infected with tuberculosis, a highly infectious disease that has become a major public health problem in the nation's jails and prisons. Infected inmates leaving through the prison system's revolving door to make room for the new arrivals will carry the disease with them to be spread throughout

the community. The State's failure to meet its obligation to house convicted felons and the State District Court judges' refusal to give adequate consideration to alternative sentencing methods creates still another hazard to the citizenry.

EXPENSES OF IMPLEMENTATION OF THE JOINT PLAN

The defendants were unable to agree upon a fair distribution of the expenses involved in undertaking the various remedial programs described in the Plan. The Court finds that the primary responsibility, and therefore the primary financial burden, falls on the State. As the Court has previously noted, the County Defendants were approaching compliance with the orders of this Court until the State Defendants abdicated their responsibility for receiving convicted felons, leaving the inmates in the county jails indefinitely. It was at that point that the jail population began to soar.

This conduct on the part of the State will continue to result in unconstitutional overcrowding unless the State begins to identify, implement and fund necessary changes to its prison system. The parties' joint projection forecasts that by September 1995, the number of TDCJ-ready inmates in the Harris County Jail Facility will be 11,683, almost double the number of Harris County inmates in the facility. Harris County would house approximately 85% of the total 13,752 state-wide backlog of TDCJ-ready inmates, and would house more convicted felons than most TDCJ facilities.

Then, as now, the majority of problems identified by the Monitor at the Harris County facility result from the large number of TDCJ inmates which the State will not receive. For example, the extensive educational and vocational programs recommended by the Monitor are not constitutionally required in a traditional County detention facility where inmates are typically released in a relatively short time. Because the conduct of the State Defendants has converted the Harris County Jail into a major facility for convicted felons, such programs become

more important. The County should not, however, be forced to bear the expense of educating and providing job-training to the inmates which are TDCJ-ready but which the State will not accept.

Though the State Defendants repeatedly raise the provisions of House Bill 93 as evidence of their good faith efforts to address the serious overcrowding problems, the State has not utilized the primary remedies set forth in the legislation in a manner that will give adequate relief to the Harris County jail. The Court finds that the primary responsibility for the overcrowding crisis in the Harris County Jail Facility lies with the State Defendants who have the power and the ability through legislation to act to resolve the situation. The State has declined to do so. The Court will order that the provisions of the Proposed Joint Remedial Plan be implemented fully. The County will continue to fulfill its traditional role of providing a short-term detention facility and will implement at its expense pre-trial bond review, review of the practices and procedures associated with the processing of cases and inmates, review of felony bail practices, and recommendations to expedite PPT/PIA referrals and review of federal prisoners, undocumented aliens, and other categories of inmates in the jail facilities. The State must begin to accept its role of providing prison facilities for convicted felons and is ordered to provide funding for all other aspects of the Plan.

MONITORS' FINDINGS OF FACT

The monitors have submitted proposed findings of fact, to which the parties have filed written objections. Having reviewed the proposed findings and the objections, the Court determines that the findings are proper and should be adopted in their entirety.

CONSENT DECREE

The Court notes that notwithstanding encouragement from the Special Master to seek modification of the previously entered consent decree, the County Defendants have failed to move to modify. The Court also finds, however, that certain issues covered by the consent decree are now neither necessary nor desirable. Consequently, the Court in its final order will, sua sponte, modify the consent decree to eliminate all issues and requirements except as follows. Because the State Defendants were not parties to the consent decree, these remedial matters shall be at the expense of the County Defendants.

The County Defendants, while hiring extraordinary numbers of new employees, continue to be in non-compliance with the 9-9-7 staffing requirements of the consent decree. The Court finds that adequate staffing is mandatory to ensure compliance with the requirements of the United States Constitution. As a result, the final order shall require that the County Defendants, within 90 days of entry of that order, either reach full compliance with the 9-9-7 provision of the consent decree or present an alternative plan for approval by the Court.

Secondly, while the Court notes that the County Defendants have obtained certification of their medical facilities, the Court will require that the County submit within 90 days of entry of the final order a written medical plan.

The area which causes the most concern to the Court is the ventilation problem. This problem presents significant health risks to the entire population of Harris County and the surrounding areas, and it must be addressed immediately. Therefore, the County Defendants will be required to submit within 30 days of entry of the final order a written plan for the immediate repair of the Central Jail ventilation system, together with definite arrangements for funding those repairs and an expedited renovation schedule.

The Court is also concerned that the County Defendants are not providing mattresses to some inmates who are required

to sleep on the floor. While a bed may not be constitutionally required, forcing inmates to sleep on the bare floor without a mattress indicates a willful disregard of minimum constitutional standards. As a result, the final order will also require the County Defendants to obtain within thirty days a sufficient number of mattresses such that each inmate will be provided a mattress.

Finally, the Court finds that the condition of the kitchen equipment in the Harris County facilities, particularly the Central Jail, presents a significant health risk. Consequently, the final order will also require upgrading of the kitchen equipment deficiencies within 90 days.

CONSTITUTIONAL CAPACITY

The Court has also reviewed the capacity limitations from the consent decree and finds that they should be modified. Based upon the evidence presented in connection with the 701 Building, the Court believes that the Harris County facility can be maintained at a constitutional capacity of 112.5% of design capacity. The final order shall require that the population of the Harris County Jail facilities be at 9800 inmates, or 112.5% of design capacity, by March 31, 1993. The specific breakdown by facility is as follows: 701 Building - 4500 inmates; 1301 Building - 3950 inmates; 301 Building - 475 inmates; Detention Center - 875 inmates.

Additionally, because the Court has found that the population explosion in Harris County is primarily the result of the refusal of the State Defendants to accept TDCJ-ready inmates, the State Defendants shall pay to the Court a fine of $50 per person per day after March 31, 1993 that the population in the Harris County facilities exceeds the new cap.

ALLOCATION OF MONITORS' FEES

As previously stated discussed above, the Court finds that the primary cause of the overcrowding crisis in the Harris County Jail Facility is the State's refusal to accept its TDCJ-ready inmates. The Court does not, however, completely absolve the County Defendants from all responsibility. Accordingly, the monitors' fees incurred from February 1, 1989, the first month following the joinder of the State Defendants as parties to this suit, shall be allocated ninety percent (90%) to the State Defendants and ten percent (10%) to the County Defendants.

CONCLUSION

Based upon the foregoing, the State Defendants shall bear the expense of all programs in the Proposed Joint Plan except those discussed above as falling within the traditional role of County detention facilities. The expense for those traditional County functions shall be borne by the County Defendants.

Additionally, the Tentative Findings of the Monitors are adopted in their entirety as findings of fact. The consent decree shall be modified as discussed above, including a new constitutional capacity cap of 112.5% of design capacity. Should the new cap not be met by March 31, 1993, the State Defendants shall be required to pay to the Court the fine previously noted.

The Monitors' fees incurred from February 1, 1989 shall be apportioned 90% to the State Defendants and 10% to the County Defendants. The County Defendants shall be required to submit within 14 days an affidavit memorializing those fees.

The Court would note that its decision to require the State Defendants to bear primary responsibility for financing the Proposed Joint Plan and to pay a fine for excess inmates in the Harris County Jail Facilities after March 31, 1993 is not particularly satisfying. But early or accelerated release of prisoners is not the answer here nor should it be until all other

means of seeking compliance are exhausted. The Court, however, finds that it is the State Defendants who control the legislative mechanism for relieving the overcrowding problem and allocating the cost of that remedy. Unfortunately, the previous attempts by the state legislature to address these issues have been inadequate. Until such time as the legislature enacts a proper remedy and cost allocation, the federal court has no alternative but to rule on the case before it.

A final order consistent with this memorandum opinion shall be issued this day.

SIGNED this 29th day of September, 1992.

/s/
Judge DeAnda
Chief Judge
United States District Court

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
Plaintiffs,	§	
	§	
VS.	§	
	§	
THE SHERIFF OF HARRIS COUNTY,	§	
TEXAS, ET AL.,	§	
Defendants/	§	
Third Party Plaintiffs,	§	
	§	
VS.	§	C.A. #. 72-H-1094
	§	
ANN RICHARDS, ET AL.,	§	
Defendants/	§	
Third Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered the COUNTY DEFENDANTS' Motion to Withdraw $3,000,000 and All Accrued Interest on Deposit in the Court's Registry, and for Expedited Consideration, said $3,000,000 having been deposited by the State Defendants on December 17, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$3,000,000 and All Accrued Interest on Deposit in the Court's Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $3,000,000 together with all the accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 20th day of February, 1992.

/s/
JAMES DEANDA
CHIEF JUDGE,
UNITED STATES DISTRICT COURT

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

This case is before the Court on County Defendants' motion to extend the September 11, 1991 order and motion that the state defendants be required to deposit additional funds into the Court's registry. State Defendants have filed a written response to the motions. Because certain events outside the Court's control have delayed the entry of a permanent remedial decree as contemplated by the September 11 order, it is hereby

ORDERED

that the Court's order of September 11, 1991 is extended until altered by a subsequent permanent remedial order or other order of the Court. The Court notes that, pending a permanent remedial decree, its prior holding that the constitutional capacity of the jail facility is its design capacity continues in effect, establishing a current constitutional capacity of the Harris County jail facility at 8,698.

IT IS FURTHER ORDERED that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02,

on or before December 16, 1991, the sum of three million dollars ($3,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 25th day of November, 1991.

/s/
Chief Judge
United States District Court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be heard COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all accrued interest from the Court Registry, and for Expedited Consideration, said $2,000,000 having been deposited by the State Defendants on September 30, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$2,000,000 and all Accrued Interest from the Court Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $2,000,000, together with all accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 25th day of October, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants/ Third Party Plaintiffs,	§	
	§	
VS.	§	
	§	
ANN RICHARDS; ET AL.,	§	
	§	
Defendants/ Third-Party Defendants.	§	

ORDER

This case is before the Court on county defendants' second motion to require state defendants to deposit additional funds into the Court registry. The Court, after considering the motion filed herein, is of the opinion that the county defendants' motion should be granted. Accordingly, it is hereby

ORDERED that the county defendants' second motion to require state defendants to deposit additional funds into the Court registry is GRANTED, and state defendants are hereby

ORDERED to deposit $2,000,000.00 into the Court registry on or before September 30, 1991, from which the county defendants shall be authorized to pay up to $40.00 per diem for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas county detention facilities.

SIGNED this the 13th day of September, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, and for expedited Consideration, said $1,000,000.00 having been deposited by the State Defendants on August 12, 1991, and the Court, after considering the motion filed herein, if of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$1,000,000.00 and all accrued interest from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $1,000,000.00, together with all accrued interest, on STATE DEFENDANTS' deposits of $750,000.00 and $1,000,000.00 into the Registry of the Court, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 13th day of September, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were

transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $750,000.00, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 7th day of August, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND ORDER

This case is before the Court on remand from the United States Court of Appeals for the Fifth Circuit for findings regarding the issue of deliberate indifference on the part of the State and/or County defendants as now required under Wilson v. Seiter, _____ U.S. _____, 59 U.S.L.W. 4671 (June 17, 1991). Because of the emergency nature of the current overcrowding and medical conditions in the Harris County jail facilities, the Court considers it imperative that these findings be made immediately. Consequently, having reviewed the record in this case, the Supreme Court opinion in Wilson v. Seiter, and the July 25, 1991 opinion of the Fifth Circuit, the Court finds that the State defendants' and, to a much lesser degree, the County defendants' awareness of the extremely cruel conditions in the county facilities and their failure to take steps to remedy those conditions constitutes deliberate indifference as required by Seiter. The Court notes however, that the new County jail facility is scheduled to open next month. Once that facility becomes operational, the Court will revisit the issue of whether the

County defendants have any continuing liability in this case or whether they have taken all possible steps to correct the overcrowding and medical care problems in the Harris County jail system.

In accordance with the July 25 opinion of the Fifth Circuit, all prior orders of this Court which were previously stayed pending appeal are again in full force and effect upon entry of this order. Therefore, State defendants are directed to deposit within 48 hours of receipt of this order one million dollars ($1,000,000.00) into the Registry of the Court, fund 4:72cv1094-02. Additionally, the data and reports required by the Court's order of July 8, 1991 are due on or before August 12. As previously ordered by the Court, the parties are admonished that timely compliance with prior orders of the Court is imperative.

IT IS SO ORDERED.

SIGNED this 7th day of August, 1991.

/s/ James DeAnda
Chief Judge
United States District Court

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

In accordance with the orders of this Court entered February 7, 1991, March 15, 1991 and April 23, 1991, it is hereby

ORDERED

that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before June 10, 1991, the sum of one million dollars ($1,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 28th day of May, 1991.

/s/
JAMES DEANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,	§	
	§	
Defendants,	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS, ET AL.,	§	
	§	
Third-Party Defendants.	§	

ORDER

The Court's current remedial order of February 7, 1991, as modified on March 15, 1991, remains in effect only until May 1, 1991, also the date on which oral argument is scheduled before the United States Court of Appeals for the Fifth Circuit on the various petitions and appeals filed in this case. So that the appellate court may know the intended course of this Court's continued remedy, it is important that the next order be issued promptly.

As of April 15, 1991, the population of the Harris County detention facilities was 7,565, or 1,265 over the cap imposed in the February 7, 1991 Order. The State defendants deposited $750,000.00 in the Registry of the Court on April 2, 1991. Since then, the County defendants have transferred only 250 convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) to other county jails. Another 120 prisoners are scheduled for transfer during the week of April 15, 1991, but it is reportedly unlikely that the County defendants will be able to transfer more than 360 prisoners by the end of April, leaving the total population some 1,200 prisoners over the cap at the expiration of the current order on April 30, 1991. The County defendants, thus, have failed to comply with the terms of the February 7, 1991 Order, as amended on March 15, 1991.

The County defendants cite the difficulties of completing legal and financial arrangements for the ordered transfers, especially in light of the uncertainty over funding which was not resolved until April 1, 1991, and report that they are ready to transfer up to 1,500 prisoners in May, if required to do so.

It is necessary to repeat the warnings contained in the Court's March 15, 1991 Order. When that order was issued, the overall population of the Harris County detention facilities stood at 7,376, or 157 percent of their design capacity; now, it is at 7,565, or 161 percent of the design capacity. This present total exceeds by 1,565 that number of prisoners the Alberti monitor and the State defendants' expert testified could be managed safely and securely for even a limited period of time. These population figures are approaching crisis proportions. As noted on March 15, 1991: "We are talking here about life and death, and the most fundamental rights of the plaintiff class." The danger to the plaintiffs has grown, not diminished, over the past two months.

In the meantime, the State appellate court has not yet decided pending litigation over the allocation of responsibility

and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities, nor has the State legislature dealt definitively with that issue. At the same time, the Fifth Circuit is now reviewing the various pending petitions and appeals in this case.

In accordance with the foregoing, it is ORDERED:

1. That the remedial decree entered in this case on February 7, 1991, as modified on March 15, 1991, shall remain in effect until September 15, 1991. The State defendants shall be required to deposit in the Registry of the Alberti Court additional deposits when the Court is notified by the County defendants that the original $750,000.00 deposited by the State defendants on April 2, 1991 is exhausted, unless the Fifth Circuit directs otherwise after its consideration of the parties' petitions and appeals.

2. As before, the Court specifically retains jurisdiction over this matter.

SIGNED this 22nd day of April, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al.,	§	Civil Action No. 72-H-1094
Defendants, and Third-Party Plaintiffs,	§	
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

On February 7, 1991, the Honorable James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in this action, entered an order, part of which directed the State third-party defendants to deposit in the registry of the Alberti court $750,000.00, to be used to pay the costs of detaining in other county detention facilities some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division. In response to that order, the State defendants filed its motion to vacate or to stay the order, directing its motion both to Judge DeAnda and to myself, as the sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended

in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).[1]

As I explained in the memorandum opinion I filed contemporaneously with Judge De Anda's February 7 Order, I did not join with that portion of the order relating to the deposit of $750,000.00, for two reasons. First, I noted that I had not been directed to any portion of the record, developed before Judge DeAnda in Alberti, which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate reference to the record in that respect, I could not determine whether that specific party of the relief ordered would fall within the category of matters arising out of the Alberti litigation which the Fifth Circuit, in In re Clements, transferred to the Ruiz court. Second, I explained that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it.

In regard to the pending motion of the State defendants, I should make two observations. First, because I did not join in entering the order to which the State's motion is addressed, I cannot properly grant the relief the State defendants now seek. See Gallimore v. Missouri Pac. R. Co., 635 F.2d 1165, 1171-72 (5th Cir. 1981). Second, with regard to the question whether or how requiring the State to pay $750,000.00 into the registry of the Alberti court would affect the State's ability to comply with Ruiz, I take note of the excerpts from the testimony in Alberti of David McNutt, Assistant Director for Budget and Managing Services for the Institutional Division of the Texas Department of Criminal Justice, attached as exhibit D to the State's motion,

---

[1] After the Governor of the State of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the State defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

which is incorporated herein by reference. After consideration of that testimony, I conclude that the State's ability to comply with the orders entered in Ruiz will be endangered by the requirement that it pay $750,000.00, and possibly more, for the detention of some of Harris County's overflow Institutional Division-ready inmates. To be specific, I find that this aspect of the relief ordered against the State defendants likely will adversely affect their ability to operate and manage TDCJ-operated confinement facilities in such manner as to comply with the Ruiz decree. I would note that I do not find any other aspect of the relief Judge DeAnda has directed in the February 7 order to conflict in any way with the provisions of the Ruiz decree.

SIGNED this 15th day of March, 1991.

/s/
William Wayne Justice
United States District Judge

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.,	§	
	§	
Defendants.	§	

ORDER

The State defendants in this case have sought to vacate or stay the Court's remedial order signed February 7, 1991, while the plaintiffs and the County defendants seek a number of modifications to the same order.

The State's motion to vacate or stay the order is DENIED. According to the most recent statistics provided by the County defendants to the parties and the Court, the population of Harris County detention facilities on Monday, March 11, 1991, was at 7,376 prisoners or 157 percent of the design capacity of those facilities. This number exceeds by 1,376 the number of prisoners the Alberti monitors and the State defendants' own witness testified could be managed safely and securely for even a limited period of time. These population figures are beginning to approach these numbers that led to the outbreak of a respiratory, pneumococcal epidemic that struck down dozens of inmates and claimed two lives in mid-1989. We

are talking here about life and death, and the most fundamental rights of the plaintiff class.

The February 7, 1991 order carefully refrained from actions with a direct and substantial effect on the Texas prison system. In In re Clements, the Fifth Circuit transferred to the Ruiz court only "so much of the remedy portion of the Alberti third-party action as seeks to enjoin them to receive or take prisoners into TDC confinement (or to otherwise take action in the operation or management of TDC-operated confinement facilities)." 881 F.2d 145, 153 (5th Cir. 1989). A requirement that the State defendants provide funds to underwrite tentatively the transfer of felons to other county jails represents no departure from the Fifth Circuit's directive. As understood by this Court, the Fifth Circuit did not immunize the State defendants from contributing in any form to the remediation of unconstitutional conditions for which they have been found liable.

This Court's February 7, 1991 order did not impose final responsibility on the State for the cost of any transfers required pursuant to the Order. Rather, that Order expressly recognized that the allocation of responsibility and costs for the maintenance of felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) was an issue in litigation currently pending in the State courts and that the outcome of that litigation will determine any appropriate final accounting for these costs in this case. That the February 7, 1991 order included a preliminary assessment at all was due to the fact that other Texas counties could not be expected to receive felons ready for transfer to TDCJ-ID from Harris County without advance payment. Representatives of the Sheriff's Department have testified that counties contacted by the County defendants refused to consider any transfers from Harris County without the promise of immediate payment. There is, then, no issue of abstention here, nor, ultimately, are Eleventh Amendment and Pennhurst principles raised by the Court's February 7, 1991 order, which, while seeking to address immediate and critical constitutional deficiencies, left to State courts any final

accounting. Given all of these circumstances, it is hard to identify another case in which the burden of suffering irreparable and substantial harm rests more clearly on the party opposed to the movant. The State defendants' motion to delay further the relief of unconstitutional conditions in Harris County detention facilities is DENIED.

In response to the motions of the plaintiffs and the County defendants, the following modifications to the February 7, 1991 order are adopted:

1. Paragraph 1 of that order is amended to read:

> This remedial decree supersedes all previous remedial orders in this case that conflict with the terms of this order, and shall remain in effect until May 1, 1991.

2. Paragraph 2 of the February 7, 1991 order which reads:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population.

is amended to read as follows:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall

> cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population. In any event, the total population of Harris County detention facilities shall not exceed 6,300 for more than seven consecutive days without triggering the transfer provisions of this order.

3. That portion of paragraph 3 of the February 7, 1991 order which reads:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas County detention facilities identified and selected by the Sheriff.

is amended to read as follows:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of five or more years to such other Texas County detention facilities that meet the minimum standard of the Texas Commission on Jail Standards and are identified and selected by the Sheriff. Transfers made pursuant to this provision shall be conducted once weekly.

4. That portion of paragraph 4 of the February 7, 1991 order which reads:

> The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

is amended to read as follows:

> The County defendants shall file with the Registry of the Alberti Court by March 20, 1991 a resolution adopted and passed by the Commissioners Court of Harris County that the County "is financially able to and has adequate resources from which to pay $750,000.00 in the event State defendants ultimately prevail on the issue of cost allocation."

5. Paragraph 6 of the February 7, 1991 order is amended to read as follows:

> The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble by May 1, 1991 and the residential probation program in the 701 Building by September 1, 1991.

All other modifications sought by the parties to the February 7, 1991 order are DENIED.

SIGNED this 15th day of March, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants, and Third-Plaintiffs,	§	Civil Action No. 72-H-1094
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

I write separately to clarify my relationship to the relief set forth in the order entered contemporaneously herewith by the Hon. James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in Lawrence R. Alberti, et al. v. the Sheriff of Harris County, Texas, et al., civil action No. 72-H-1094, with which I have only one point of disagreement.

My connection with the Alberti litigation arises from my position as sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). After the Governor of the State

of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the state defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

While the relief Judge DeAnda now orders clearly is within the scope of Alberti, one aspect of the order seemingly falls within the category of matters within the purview of the Ruiz court. After directing the transfer to other county detention facilities of some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division, Judge DeAnda directs that "[t]he State defendants shall deposit in the Registry of the Alberti court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay $40.00 per diem for each transferred inmate." I have not been directed to any portion of the evidence in Alberti which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate record in that respect, I cannot agree to that specific part of the relief ordered.

I also would note that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it. The issue underlying the cost question is the relative responsibilities of the state and the counties for Institutional Division-ready detainees. The matter plainly is one of substantial public concern. Furthermore, developments in the law of Texas relating to the issue indicate that the question is an unsettled one.

First of these developments is Tex.Rev.Civ.Stat.Ann. art. 6166a-4 (Vernon 1991), which became effective March 20, 1990, and which directs the Texas Board of Criminal Justice to establish a formula for allocating the number of inmates that each Texas county can transfer to the Institutional Division each week. The statute requires the Board to consider factors which "shall include but are not limited to:"

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act that occurred in the county or counties in the 12 preceding months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

Tex.Rev.Civ.Stat.Ann. art. 6166a-4(a).

The statute directs the Board to consider waiving the allocation formula for a county "(1) that experiences a rapid increase in persons convicted of felonies for reasons other than traditional sentencing practices in the county; or (2) in which the jail inmate population exceeds the approved capacity of the county's jail facility, as established by the Commission on Jail

Standards." Tex.Rev.Civ.Stat.Ann. art. 6166a-4(c). Such modifications of the allocation formula are prohibited, however, after November 30, 1990. Tex.Rev.Civ.Stat.Ann. art. 6166a-4(e).

It seems plain that in setting a limit on the number of prisoners each county can transfer to the Institutional Division, the Texas legislature intended that the county remain responsible for detaining those inmates it cannot transfer because it has filled its weekly allocation. To make the state responsible for Institutional Division-ready detainees in excess of a county's allocation would render the allocation process meaningless. Similarly, in the present action, to require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates in other county detention facilities would appear to effectively override the allocation the Board of Criminal Justice has established for Harris County in accordance with the statute.

The second development pertinent to the issue at hand, of which I take judicial notice, is the decision in County of Nueces, Texas v. Texas Board of Corrections, et al., No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas) (Hart, J.). Construing Texas law before the enactment of art. 6166a-4, the court held that the state has a duty to reimburse counties for the costs incurred by detaining inmates who are ready for transfer to the Institutional Division. See partial summary judgments, filed April 18, 1989, and September 9, 1989. In a subsequent ruling, Judge Hart held that the enactment of art. 6166a-4 did not affect his holding in the case. See judgment, filed August 22, 1990. The court's decision currently is on appeal before the Third Judicial District Court of Appeals at Austin. Though not a party to the Nueces action, Harris County has filed an action in the same court seeking the same relief ordered in Nueces. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas).

The third matter of importance for the question presented here, of which I also take judicial notice, is the introduction into the Texas House of Representatives of House Bill 13, filed November 12, 1990, which would require the state to reimburse counties for the costs a county incurs by confining inmates who have been sentenced to the Institutional Division. Counties would be repaid not only such costs as they are incurred in the future, but also the amounts expended from September 1, 1989, until the date the act becomes effective. Thus, if enacted in its present form, the Bill would require the state to reimburse Harris County for the costs at issue here.

Perhaps the most important consequence of the introduction of House Bill 13 is that the question presented here will be resolved in the very place it should be decided, the Texas legislature. Its introduction also adds support to the conclusion that Texas law does not at present require the state to pay the cost of detaining a county's Institutional Division-ready prisoners. At the very least, the state's duty to pay such costs is not a settled matter of Texas law.

These three developments, taken together with other considerations, suggest that the proper course for this court is to abstain from deciding whether Texas law requires the state to reimburse Harris County for costs incurred in confining Institutional Division-ready inmates at other county detention facilities. New Orleans Public Serv. v. Council of New Orleans, 109 S.Ct. 2506 (1989), contains recent teaching from the Supreme Court concerning the circumstances in which abstention is proper. After discussing the Court's decisions in Burford v. Sun Oil Co., 319 U.S. 315 (1943) and Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341 (1951), Justice Scalia, writing for seven members of the court, stated:

> From these cases, and others on which they relied, we have distilled the principle now commonly referred to as the "Burford doctrine." Where timely and adequate state review is available, a federal court sitting

> in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;' or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

109 U.S. at 2514.

The question presented here falls squarely into the first category in which the New Orleans Court would find Burford-type abstention proper. To require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates would "interfere with the proceedings or orders" of the Texas Board of Criminal Justice in establishing Harris County's allocation of transfers to the Institutional Division, in accordance with art. 6166a-4. The issue presents a difficult question of Texas law, and certainly is one that bears on a policy problem of substantial public import whose importance transcends the result in the case at bar, as to the legal point in contention here. The policy problem underlying the cost question presented here is the relative responsibilities of the Institutional Division and the counties for detention of Institutional Division-ready inmates in excess of each county's allocation. While the issue whether the state or Harris County should bear the costs of alternative detention for overflow Harris County prisoners obviously is significant, it is less important than the underlying policy problem, which has state-wide ramifications.[1]

---

[1] The second category of Burford-type abstention to which the New Orleans opinion refers is that where repeated decisions by the lower federal courts concerning a subject matter of public concern would frustrate state efforts to establish a coherent policy with regard to that matter. See Burford v. Sun Oil, Co., supra, 319 U.S. at 326-31. The present action does not

In several cases, the Supreme Court has endorsed or ordered abstention by the federal district court upon facts similar to those presented here. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968), involved claims concerning water use which turned on the meaning of "public use" under the New Mexico Constitution. The district court decided the claims, and the Court of Appeals rejected a motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in state court. 391 U.S. at 593-94. The Supreme Court reversed, stating:

> The Court of Appeals erred in refusing to stay its hand. The state law issues which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

391 U.S. at 594.

In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), as in the case at bar, conflicting indications

---

precisely fit this category, because actions like the one at bar are not likely to frequently recur. On the other hand, rendering a decision here likely would cause the same type of harm the Burford Court sought to avoid, that is, it would disrupt the state's efforts to establish a coherent, state-wide policy concerning the relationship between the Institutional Division and the county jails.

concerning a question of state law rendered the federal district court unable to determine with confidence how the highest court of the state would decide the issue before it. 360 U.S. at 30. Because the matter, involving the law of eminent domain, was one of substantial public concern, the Court upheld the district court's decision to abstain from deciding the case until the state supreme court had had an opportunity to rule on the question. 360 U.S. at 28-31. In explaining its decision, the Court noted:

> [W]e have held that the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of a state court action. Meredith v. Winter Haven, 320 U.S. 228, 236. But where the action touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, . . . we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

360 U.S. at 27-28.

In Fieldcrest Dairies, to which the Thibodaux Court refers, a company that marketed milk in the city of Chicago applied for a permit to sell milk in paper containers. Because a city ordinance required milk sold in quantities less than one gallon be delivered in standard milk bottles, the city board of health refused to grant the permit. The company brought an action in the federal district court, seeking a declaratory judgment that the ordinance did not prohibit the sale of milk in paper containers, or, in the alternative, that such a prohibition would be unconstitutional and invalid. During the pendency of the action, the Illinois legislature enacted the statute regulating the sale of milk, which arguably conflicted with the Chicago city ordinance. 316 U.S. at 169-70.

While the district court and the court of appeals decided the case on the merits, the Supreme Court reversed, holding that the lower courts should have abstained from adjudicating the case. Noting that the Illinois courts and legislature would have the final say as to the meaning of the ordinance in question and as to the alleged conflict between the ordinance and the statute, the Court stated, "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast -- a prediction as to the ultimate decision of the Supreme Court of Illinois." Because the law in question was unsettled, and because "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State," the Court found that

> [t]he delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the Pullman case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.'

316 U.S. at 172 (citations omitted).

The same concerns counsel abstention here.

As noted above, Harris County has instituted in the Travis County district court an action seeking relief which would include recovery of the costs at issue here. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). It is well established that the pendency of a parallel state court action does not in itself require the federal court to abstain. See, e.g., Moore v. Sims, 442 U.S. 415, 423 n.8 (1979). But the prosecution of that action ensures that Harris County will have "timely and adequate state court

review" of the cost issue in question here. See New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514. Similarly, the introduction of House Bill 13 does not require abstention, but the fact that the Texas legislature apparently will address the question now at bar increases the desirability of abstention by a federal court from deciding the issue.

Both in practical terms and under the provisions of art. 6166a-4, Institutional Division-ready detainees in excess of a county's weekly allocation of transfers to the Institutional Division remain in custody of the county. I am cognizant, then, that to abstain from deciding the cost issue presented here would require, for the present, that Harris County continue to bear the expense of confining those inmates it cannot transfer to the Institutional Division, including any such prisoner the Alberti court orders the County to transfer to other county detention facilities. I would not now hold that Texas law imposes no duty on the state to pay the costs a county incurs in detaining Institutional Division-ready prisoners in excess of a county's weekly allocation. Rather, because I believe that the matter poses a "difficult question[] of state law bearing on policy problems whose importance transcends the result in the case at bar," New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514, I would abstain from deciding the issue.

SIGNED this 7th day of February, 1991.

/s/
William Wayne Justice
United States District Judge